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# DIGEST OF THE DECISIONS

OF THE C

## SUPREME COURT

OF

## THE UNITED STATES,

FROM THE ORGANIZATION OF THE COURT TO THE  
CLOSE OF THE OCTOBER TERM, 1884.

BY

JONATHAN KENDRICK KINNEY.

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TWO VOLUMES.

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1. — *Lease — Construction.*] A contract is a lease where it contains all the essential elements thereof. *Thomas v. West Jersey Railroad Co.*, 101 U. S. 71.

2. Where the government hires buildings and surrounding grounds to be used for "all purposes," it may use the buildings for a small-pox hospital. *United States v. Bostwick*, 94 U. S. 53.

3. Where the government hired buildings, etc., for a certain term at a certain sum per month, with the privilege of an extension of the term, and the lessor after expiration of the term accepted a payment without objection at a less rate for part of the term and for time beyond, that rate was held to be the rate at which the extended term should be computed. *Id.*

4. Where a lease stipulated that if the tenant underlet or attempted to remove any of his goods without consent, then, at the landlord's option, the term should cease, "and moreover, in either of said cases, . . . one whole year's rent" over and above such rents thereinbefore reserved to be paid each month as should already have accrued should become due and might be "levied by distress and sale" of goods, it was held that the stipulation contemplated rent in advance, at the landlord's option, and not a penalty independent of rent. *Dermott v. Wallach*, 1 Wal. 61.

5. Where a city on the Mississippi leased a wharf for a certain term, stipulating that if the right to collect wharfage should be "suspended for any period by the intervention of third parties" the time of such suspension should be added to the term, it was held that the time during which navigation was interrupted by the war was not within the stipulation. *Marshall v. Vicksburg*, 15 Wal. 146.

6. And where it provided that if the right to collect wharfage should be "interrupted or defeated permanently through the instrumentality or with the aid" of the city, the property which the lessee had conveyed to the city should revert, it was held that his right was not violated by an ordinance reducing wharfage charges which he himself caused to be passed, nor by a tax, as dis-



**LANDLORD AND TENANT — continued.**

tinguished from a wharfage charge, which the city had reserved a right to lay, nor by a quarantine embargo laid with the complainant's consent. *Ib.*

7. Under the act of May 20, 1870 (16 Sts. 124), authorizing a market company in the District of Columbia to let its stalls for a term of years to the highest bidders, subject to the payment of a fixed annual rent, one so hiring to "be considered as having the good-will and the right to retain the possession thereof so long as he chooses to occupy the same for his own business and pay the rent therefor," the lessee's right of occupancy ceased with the term. [BRADLEY and HARLAN, JJ., dissenting.] *Washington Market Co. v. Hoffman*, 101 U. S. 112.

8. Where one wrote to his kinswoman, a married woman, proposing to her to occupy a farm on which she and her husband then were living, and to pay a certain rent therefor, and she accepted, and there was nothing in the correspondence beyond the offer and the acceptance from which to infer an intent to lease to her to the exclusion of her husband, the husband was held to sustain the relation of tenant to the lessor. *Lucas v. Brooks*, 18 Wal. 436.

9. A covenant in a lease giving the lessee an option to purchase during the term is in the nature of a continuing offer to sell, and binds the lessor when duly accepted, the lease, being under seal, importing consideration, and the offer, therefore, an offer from which the lessor cannot recede. *Willard v. Tayloe*, 8 Wal. 557.

10. — *Rights and Liabilities of Tenant — Right to attorn to Holder of Paramount Title, to remove Buildings, to demand Payment therefor, etc. — Liability for Waste, for Accidental Damages.* Where one builds on land of another, agreeing to pay a certain ground rent, and to surrender after a certain time on payment of the value of the building, to be fixed by arbitrators and to be a lien on the property, and the appraisalment is made and judgment rendered for the amount, the lessee remaining in possession must, in equity, be treated as a mortgagee in possession, and, while entitled to interest on the sum awarded, must account for rents and profits. *Scruggs v. Memphis & Charleston Railroad Co.*, 108 U. S. 368.

11. Tenants in possession under one who is a constructive trustee by reason of a fraud, but who are not averred to have had notice of the fraud, cannot be ousted by a court of equity. *Ringo v. Binns*, 10 Pet. 269.

12. Where a tenant is threatened with a suit by the holder of a paramount title, he may submit in good faith and attorn to the holder of such title; the threat of suit is equivalent to an eviction. *Merryman v. Bourne*, 9 Wal. 592.

13. Where premises in Louisiana, belonging to a citizen of that state, were seized by the federal military authorities in the owner's absence, as abandoned, and the lessee in possession was compelled to enter into a new lease, and to pay rent

**LANDLORD AND TENANT — continued.**

thereafter to such authorities, it was held that the owner could not recover of the lessee the rent for the period during which he paid to such authorities. *Harrison v. Myer*, 92 U. S. 111.

14. Where, on the occupancy of Memphis by the federal forces, the commanding general ordered a lessee of premises to pay rent to a military rental agent instead of to the agent of the lessor, to be sent to the lessor within the Confederate lines, whither he had gone, and the lessee refused and was accordingly dispossessed, and his sub-lessees were ordered to pay, and did pay, to the military rental agent, it was held, in a suit by the lessor against the lessee, that the latter was not liable for rent for the period during which he was thus dispossessed. *Gates v. Goodloe*, 101 U. S. 612.

15. A building erected by a tenant with a view to carrying on his business as a dairyman, and as a residence for his family and servants engaged in that business, the residence of the family therein being merely to enable them to carry on the trade more beneficially, may be removed by the tenant during the term, whatever its size or materials. *Van Ness v. Pacard*, 2 Pet. 137.

16. In the absence of contract, the landlord is not bound to pay the tenant for buildings erected during the term, the innovation on the common-law rule having gone no further than to give the tenant a right to remove them while he is in possession. *Kutter v. Smith*, 2 Wal. 491.

17. Where a lease of a water-power provides plainly and with a specification of rates for an abatement of rent for failure of water, the tenant cannot, by bill to enjoin a writ of possession issued after recovery at law for forfeiture for non-payment of rent, set up a claim for repairs rendered necessary by the lessor's gross negligence: his remedy is determined by the contract. *Sheets v. Selden*, 7 Wal. 416.

18. Nor will equity restrain execution of the writ on the ground of non-reduction for failure of water, as that might have been set up in the ejectment. *Ib.*

19. In the absence of express covenant, the tenant is impliedly bound to commit no waste; as, for instance, in case of the lease "for all purposes" of buildings and surrounding lawns, gardens, etc., he is bound not to permit ornamental trees and shrubbery to be destroyed, fences and walls to be torn down, stone and gravel to be taken from quarries and pits in the surrounding lands, etc. *United States v. Boswick*, 94 U. S. 53.

20. In the absence of an express covenant to repair, a tenant is not answerable for accidental damages, nor bound to rebuild where the buildings are accidentally destroyed by fire. *Ib.*

21. Although a tenant is estopped, during the existence of the tenancy, from denying his landlord's title, yet if the tenant disclaim holding under that title, and give notice that he holds adversely, the relation of landlord and tenant is

**LANDLORD AND TENANT — continued.**

dissolved, and the landlord's right of entry is complete. *Willison v. Watkins*, 3 Pet. 43; *Walden v. Bodley*, 14 Pet. 156.

**22. — Rights and Liabilities of Landlord — Right of Entry — Lien for Rent — Distress.]** An attornment to one put in possession under a writ of *habere facias* for other premises dissolves the relation of landlord and tenant, and ends the tenant's right to a notice to quit. *Woodward v. Brown*, 13 Pet. 1.

**23.** At common law, re-entry for non-payment of rent can be made only after a demand of the precise sum due at a convenient time before sunset of the day when the rent was payable, and in the most notorious place on the land. *Connor v. Bradley*, 1 How. 211; *Prout v. Roby*, 15 Wal. 471.

**24.** And this, although there be no one there to pay. *Prout v. Roby*, 15 Wal. 471.

**25.** Under the statute 4 Geo. II. c. 28, to recover in ejectment for non-payment of rent, it must be proved that on some day between the time when the rent fell due and the day of the demise there was not, on the land, sufficient property liable to distress to countervail the arrears; and that must appear as the result of an examination of every part of the premises. *Connor v. Bradley*, 1 How. 211.

**26.** Where a landlord enters for non-payment of rent, he may hold buildings erected by the tenant, although he has covenanted to renew or pay for such erections at the end of the term; and it makes no difference that the lease provides for repossession by the landlord "as in his first and former estate." *Kutter v. Smith*, 3 Wal. 491.

**27.** Equity will not relieve from a forfeiture for non-payment of rent on a bill brought without tender of the sum admitted to be due. *Sheets v. Selden*, 7 Wal. 416.

**28.** In the District of Columbia, under the act of February 22, 1867, § 12 (14 Sts. 404), which gives the landlord a tacit lien on such of the tenant's chattels on the premises as are "subject to execution," beginning with the tenancy, the landlord's lien has priority over a subsequent chattel mortgage: the mortgage does not relieve the chattels from liability to execution; and the act means to exclude only chattels which are exempt from execution under some regular exemption law. *Webb v. Sharp*, 13 Wal. 14.

**29.** But it seems that a *bona fide* purchase and removal of the chattels in the ordinary course of trade will displace the landlord's lien. *Ib.*; *Fowler v. Rapley*, 15 Wal. 323.

**30.** But the lien, which attaches to any such chattels belonging to the tenant as soon as they are brought on to the premises, is not displaced, where the chattels are a stock of goods, by a sale of the stock in mass to one who knows of the tenancy, and who goes into possession and continues to occupy and sell in the ordinary way; nor by a second sale of like sort. *Fowler v. Rapley*, 15 Wal. 323.

**LANDLORD AND TENANT — continued.**

**31.** The lien is paramount to the title of one claiming under a deed of trust executed by the tenant after the beginning of the tenancy, both as to chattels on the premises when the deed was made, and as to those subsequently acquired by the tenant and placed there. *Beall v. White*, 94 U. S. 382.

**32.** Where a statute, like that of Illinois, gives a landlord the right "to seize for rent any personal property of his tenant," and also provides that every landlord "shall have a lien upon the crops growing or grown upon the demised premises in any year for rent," no lien attaches to personal property other than crops before the actual levy of a distress. A levy, therefore, made by a landlord on the personal property of his tenant after the institution of bankruptcy proceedings against the latter, is ineffective as against the title of the assignee in bankruptcy; and it makes no difference that the levy of a distress is the act of the landlord himself, and not technically mesne process, which the bankrupt act, § 14, specially mentions as ineffective against an assignment, the effect of a distress warrant being like that of mesne process, and the object of the law being to prevent the acquirement of a lien by any method after the institution of proceedings. *Morgan v. Campbell*, 22 Wal. 381.

**33.** In Virginia, the judgment in replevin on a distress for rent in arrear should be for double rent. *Alexander v. Harris*, 4 Cranch, 299.

**34. — Assignment — By Lessor — By Lessee — Surrender.]** An assignment by a lessor of all his "right, title, and interest" in the lease, authorizing the assignee to "sue for, collect, and recover" the lease, "and the rights to the rent reserved under the same," and declaring it to be "distinctly understood that it is the object and purpose" thereof to put the assignee in the place of the lessor, "so far as concerns the rights" of the lessor "under the lease," carries rent in arrear. *United States v. Hickey*, 17 Wal. 9.

**35.** The personal representatives of the lessee under a perpetual lease were held liable on the lessee's covenant to pay rent, although he had assigned the lease in his lifetime. *Scott v. Lunt*, 7 Pet. 596.

**36.** A surrender of a tenancy is not to be presumed, where it is apparent that there was no surrender in fact, and no intention either to surrender or to accept a surrender, and where the facts are not such as to constitute a surrender by operation of law, irrespective of intention. *Beall v. White*, 94 U. S. 382.

**37. — Assumpsit for Use and Occupation.]** Assumpsit for use and occupation does not lie where the holding was adverse to the plaintiff, and the relation of landlord and tenant did not exist. *Lloyd v. Hough*, 1 How. 153.

**38.** Where one goes into possession of land on an agreement or understanding that he is to purchase it, he cannot be held liable for use and occupation, — certainly where the purchase is actually

**LANDLORD AND TENANT** — continued.

concluded. *Carpenter v. United States*, 17 Wal. 439.

*Covenant with Several Lessors to keep Premises in Repair*, is joint.

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*Distillery forfeitable for Tenant's Frauds on the Revenue*.

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*Maryland — In general*.

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*Michigan — In general — School Lands, etc.*

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*Texas — In general — Location — Survey, etc.*

See LANDS OF STATES — TEXAS.

*Virginia — In general — Title, Entry, Survey, etc.*

See LANDS OF STATES — VIRGINIA AND KENTUCKY.

**LANDS OF STATES — CALIFORNIA** — Sales of Swamp Lands, etc.] Under the California statute of May 13, 1861, providing for reclamation and sale of "swamp and overflowed lands," and declaring that its provisions shall apply also to "salt-marsh or tide lands," coupled with the statute of the next day confirming sales of marsh and tide lands before then made according to laws relating to the sale of swamp and overflowed land, and declaring that unsold marsh and tide lands might be sold under provisions of existing laws for sale of swamp and overflowed lands, provided none within five miles of San Francisco should be sold by authority of that act, it was held that there was no authority for the sale of salt-marsh or tide lands within five miles of that city, the former act being in effect incorporated into the latter as the authority for future

**LANDS OF STATES — CALIFORNIA — continued.**

sales, so that sales made under the former might be said to be made by authority of the latter. *O'Neal v. Kirkpatrick*, 5 Wal. 791.

2. But were the construction of those statutes otherwise, still such a sale could not be made, being in effect prohibited by the act of April 27, 1863, which adopted a complete system for the sale of all swamp and overflowed marsh and tide lands, and excepted lands within five miles, etc., and repealed all conflicting acts. *Ib.*

3. The California statute of March 26, 1851, was a grant of the land therein described; but a confirmation thereof could be made only in case of a strict compliance with its provisions. *Field v. Seabury*, 19 How. 323, 333.

**School Lands — Grants thereof — Other Lands.**

See **LANDS OF UNITED STATES — LEGISLATIVE GRANTS**, 22 *et seq.*, 110.

**LANDS OF STATES — GEORGIA — Title — Power of Alienation — Validity of Grant — Presumption in Favor — Impeachment.]** An unextinguished Indian title held not inconsistent with seisin in fee by the state. [JOHNSON, J., dissenting.] *Fletcher v. Peck*, 6 Cranch, 87.

2. The land in question herein held to belong to Georgia, and not to Carolina nor to the United States. *Ib.*

3. The legislature had power, under the constitution of 1789, to dispose of unappropriated land within the state. *Ib.*

4. The laws of Georgia in 1787 did not prohibit the issuing of a patent for more than a thousand acres to any one person, the imposition of that limit in the act of February 17, 1783, relating exclusively to grants upon head-rights. *Patterson v. Winn*, 11 Wheat. 380.

5. Under the laws of Georgia, a patent for land lying partly within and partly without the Indian country, although void as to so much as lies within, is valid as to the residue. *Patterson v. Jenks*, 2 Pet. 216.

6. And this, although it was extended over the boundary by means of deception practised on the officer making the grant. *Winn v. Patterson*, 9 Pet. 663.

7. Although a public grant raises a presumption of compliance with every prerequisite, the court cannot safely charge that no fraud on the part of a public officer could invalidate it. *Patterson v. Jenks*, 2 Pet. 216.

8. In general, a patent can be impeached for causes anterior to its issuance in equity only. But it is necessarily examinable at law, where the grant is void, as where the state has no title, or the officer who issues the grant has no authority. *Patterson v. Winn*, 11 Wheat. 380.

**LANDS OF STATES — IN GENERAL — Grants by States — School Lands — Railroad Lands — Swamp Lands.]** A legislative grant is not a

**LANDS OF STATES — IN GENERAL — continued.**

warranty, and passes such estate only as the grantor has at the time of the grant. *Rice v. Minnesota & Northwestern Railroad Co.*, 1 Black, 358.

2. Thus, an act of a territorial legislature incorporating a railroad company, and granting it lands which congress may afterwards grant to the territory in aid of the construction of the road, is not a valid and binding grant as against the state. *Ib.*

3. The consent of congress is not necessary to a sale by a state of land in the sixteenth sections reserved for school purposes. *Cooper v. Roberts*, 18 How. 173.

4. A trespasser on such land, claiming by title adverse to that of the state, cannot inquire into mere irregularities in the sale by the state under its own statutes. *Ib.*

5. State legislation which, in making appropriations for school purposes, takes account of the proceeds of sixteenth sections and equalizes the distribution of funds arising from all sources, does not violate the act of congress providing that the proceeds of the sixteenth sections in each township shall be used exclusively for the schools in that township, if the proceeds of no such section are diverted from the township, although the township thereby receive less than its proportionate share of the funds arising from other sources. *Springfield Township v. Quick*, 22 How. 56.

6. Nor does a state statute conflict with such act which, while recognizing that act as prohibiting such a diversion, directs the school trustees and county treasurers to pay the proceeds of these sections into the county treasuries, for distribution by the county auditors among the various townships, it being apparent that the school laws of the state authorize a distribution of school funds by county auditors among the townships, and such construction of the statutes being in harmony with the act of 1855. *Davis v. Indiana*, 94 U. S. 792.

7. Where congress grants land to a state for railroad purposes, and the state appropriates the bulk of the land to those purposes, but permits the pre-emption of a small part by settlers who settled and made improvements before the grant was made, no one other than the government can object to such pre-emption, — the railroad company having waived its right to do so by accepting the land appropriated. *Baker v. Gee*, 1 Wal. 333.

8. Where a state makes a grant of land to a railroad company, defeasible if the company do not perform certain acts within a certain time, and engages in civil war before the expiration of that time, and thereby renders performance by the company impossible, the conditions, being conditions subsequent, are abrogated at law; but in equity, if the enforcement of that rule would work injustice, the court, while holding that the rights of the company have not been divested by breach of the conditions, may hold that the con-

**LANDS OF STATES — IN GENERAL — continued.**

ditions must still be complied with, and within a reasonable time, so as to put the parties as nearly as may be in the position they would have been in had no breach occurred. *Davis v. Gray*, 16 Wal. 203.

9. A state may provide for the reclamation of swamp and overflowed lands within its limits, and for an assessment of the expense on lands benefited. If the charges are apportioned in a mode substantially just and reasonable, the scheme of apportionment is not objectionable because absolute uniformity is not attained. *Hagar v. Reclamation District*, 111 U. S. 701.

10. The fact that such lands are situated in more than one county does not affect the right to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. *Ib.*

11. Nor, in California, are lands derived under Mexican grants exempt from assessment. *Ib.*

*Decisions of State Courts respecting Sales of Swamp Lands — Followed by Federal Courts.*

See **FEDERAL COURTS — STATE LAWS, RULES OF DECISION**, 48.

*Grants from United States for Schools, Internal Improvements, etc.*

See **LANDS OF UNITED STATES — LEGISLATIVE GRANTS**.

**LANDS OF STATES — IOWA — Sales, etc., of Swamp Lands.** An agreement of a county for a conveyance of swamp lands to which it was entitled under an act of congress was annulled and a reconveyance ordered, saving the rights of intermediate purchasers, where the agreement was made on information from its agent that the claim would probably be rejected by the government, and neither the county officers nor the voters to whom the matter was submitted knew the nature or the value of the property, and the grantee did know, but did not inform them, and the county's agent soon afterwards, having become the agent of the purchaser, procured an allowance of the claim, and the purchaser did not make improvements as agreed, and the consideration was grossly inadequate. [WAITE, C. J., and STRONG, J., dissenting.] *American Emigrant Co. v. Wright County*, 97 U. S. 339.

2. A bill by another county against the same defendant to set aside a deed and contract for alleged similar fraud and misrepresentations, and for inadequacy of consideration, was dismissed without prejudice to the right of the county to bring an action at law for breach of contract, the proofs falling short of the previous case. *American Emigrant Co. v. Wright County*, 100 U. S. 61.

3. Nothing in the Iowa statutes prohibits a sale of swamp lands by a county for less than

**LANDS OF STATES — IOWA — continued.**

a dollar and a quarter per acre. *American Emigrant Co. v. Adams County*, 100 U. S. 61.

*Grants from United States for Improvement of Des Moines River — Aid to Railroad — Grantees.*

See **LANDS OF UNITED STATES — LEGISLATIVE GRANTS**, 93 *et seq.*

**LANDS OF STATES — MARYLAND — Grants**

— *Lots in Washington.* In Maryland, a grant of an island by name will pass the whole island, although the description by courses and distances would exclude a part of it. *Lodge v. Lee*, 6 Cranch, 237.

2. The Maryland statute of 1793, authorizing the commissioners of the city of Washington to resell lots in that city in default of payment by the first purchaser, contemplated a single resale only; and by such resale the power given by the act was executed. *Oneale v. Thornton*, 6 Cranch, 53.

**LANDS OF STATES — MICHIGAN — School Lands — Grants thereof.**

See **LANDS OF UNITED STATES — LEGISLATIVE GRANTS**, 16 *et seq.*

**LANDS OF STATES — MISSOURI — School**

*Lands.* The title of out lots and common field lots, etc., at St. Louis, reserved for school purposes by the act of June 13, 1812 (2 Sts. 748), was vested by the legislature of that state in the St. Louis public school commissioners. *Kissell v. St. Louis Public Schools*, 18 How. 19.

*School Lands — Grants thereof — Other Lands.*

See **LANDS OF UNITED STATES — LEGISLATIVE GRANTS**, 11 *et seq.*, 102 *et seq.*

**LANDS OF STATES — NEVADA — School Lands — Grants thereof.**

See **LANDS OF UNITED STATES — LEGISLATIVE GRANTS**, 24, 25.

**LANDS OF STATES — NORTH CAROLINA AND TENNESSEE — Title — Power of Alienation.**

See pl. 1-7.

*Entry and Survey — What Subject — How made — Priorities.*

See pl. 8-18.

*Grant — Patent — Description — Validity — Priorities.*

See pl. 19-30.

*Title, how tried — Matters of Evidence.*

See pl. 31-37.

1. — *Title — Power of Alienation.* Although North Carolina had power to grant the fee to lands in the Indian territory in that state, subject to the Indian right of occupancy, yet under section 6 of the statute of 1783, which was not

**LANDS OF STATES — NORTH CAROLINA AND TENNESSEE — continued.**

repealed by the statute of 1784, entries and grants within that territory were void. *Lattimer v. Poteet*, 14 Pet. 4.

2. Mere extinguishment of the Indian title to land in North Carolina held not to subject the land to appropriation. *Danforth v. Thomas*, 1 Wheat. 155.

3. North Carolina, by her cession of the western lands to the United States, in 1789, and by her cession to Tennessee of the right to issue grants, in 1803, parted with her right to issue grants for land in Tennessee on entries made before the cession to the United States, but afterwards removed because of previous location. *Burton v. Williams*, 3 Wheat. 599.

4. North Carolina had no right, after the cession of her public lands to the United States, to make a grant to one who had no incipient right before the cession. *Polk v. Wendal*, 9 Cranch, 87.

5. Under the North Carolina statutes of 1783 to 1789, all entries, surveys, and grants of land set apart for the Indians were void. *Danforth v. Thomas*, 1 Wheat. 155; *Danforth v. Wear*, 9 Wheat. 673.

6. But a patent for land lying partly within and partly without the Indian territory is void as to so much only as lies within it. *Danforth v. Wear*, 9 Wheat. 673.

7. The North Carolina statute of April 12, 1783, offered for sale only such land as was then unappropriated. *Rutherford v. Greene*, 2 Wheat. 196.

8. — *Entry and Survey — What Subject — How made — Priorities.* Title cannot be acquired by an entry contrary to law. *Preston v. Browder*, 1 Wheat. 115.

9. A question whether the French Lick reservation was subject to appropriation by entry and survey as vacant land, under the law of North Carolina or Tennessee. *Eduard v. Darby*, 12 Wheat. 206.

10. The North Carolina statute of 1777, establishing offices for the receipt of entries of claims for land, did not authorize entries of land within the Indian boundary as defined by the treaty of Holston of the same year. *Preston v. Browder*, 1 Wheat. 115.

11. The North Carolina land act of 1783 did not prohibit one from making several entries amounting in all to more than five thousand acres, nor from purchasing entry rights acquired by others, nor from uniting several entries in one survey and patent; and such union of entries was allowed by the act of 1784. *Polk v. Wendal*, 9 Cranch, 87.

12. In Tennessee, an entry, to be special, must call for such objects that a majority of those acquainted with the neighborhood at its date could with reasonable diligence find the location; but it is not necessary that the objects called for be notorious as well as certain. *Blunt v. Smith*, 7 Wheat. 248.

**LANDS OF STATES — NORTH CAROLINA AND TENNESSEE — continued.**

13. In Tennessee, where, at law, the parties to an ejectment may go back to the original entries and inquire into their relative legal effect, it does not follow that an entry is to be preferred merely because it is prior in time. *Ib.*

14. This rule is applicable to military grants. *Ib.*

15. As to the manner of making surveys in Tennessee, see *McEwen v. Bulkley*, 24 How. 242.

16. Although a mistake in a survey may be corrected, it must not be so corrected as to injure a subsequent adjoining enterer. *Blunt v. Smith*, 7 Wheat. 248.

17. Where land entered in the name of A. is surveyed in the name of B., it is to be presumed that evidence was produced that satisfied the surveyor that B. had become the owner. It is to be presumed that public officers act rightly. *Ross v. Reed*, 1 Wheat. 482.

18. The North Carolina statute of 1784, authorizing the removal of warrants located on land previously taken up, did not repeal by implication the laws prohibiting surveys of land within the Indian territory. *Danforth v. Wear*, 9 Wheat. 673.

19. — *Grant — Patent — Description — Validity — Priorities.* A grant raises a presumption that every prerequisite to its issuance was complied with, and a warrant is evidence of the existence of an entry; but if the entry was never in fact made, and the warrant was forged, the grant is void. *Polk v. Wendell*, 5 Wheat. 293.

20. If a grant be void, as for that the state had no title, or the officer no authority to issue, the validity of the grant is necessarily examinable at law. *Ib.*

21. *Semble* that, in Tennessee, whether a grant be void or voidable only, a junior grantee cannot avail himself of its defectiveness as against a *bona fide* purchaser without notice. *Ib.*

22. Under the laws of North Carolina the first grant under a duplicate warrant was held valid, although other land had been subsequently granted on the original. *Blackwell v. Patton*, 7 Cranch, 471.

23. It is essential to the validity of a grant that it describe the thing granted so as to distinguish it from other things of like kind, but not so as to dispense with extrinsic testimony in ascertaining precisely what it is, — testimony, for instance, to prove natural objects called for. *Blake v. Doherty*, 5 Wheat. 359.

24. A call for a natural object, like a river, will control both course and distance, if the plat and survey be duly returned, and a patent issued, although no survey was actually made. *Newson v. Pryor*, 7 Wheat. 7.

25. And it will make no difference whether the object called for be in the course or at the end of the line. *Ib.*

**LANDS OF STATES — NORTH CAROLINA AND TENNESSEE — continued.**

26. If there be nothing in a patent to control the call for course and distance, the land must be bounded by the courses and distances given, according to the magnetic meridian. *McIver v. Walker*, 9 Cranch, 173; *McIver v. Walker*, 4 Wheat, 444.

27. But courses and distances must yield to calls for natural objects. *Ib.*

28. Thus, if a patent refer to a plat annexed in which a watercourse is laid down as running through the land, it must be so surveyed as to include the watercourse and yet conform as nearly as it may to the plat, although the lines so run vary from the courses and distances of the patent, and although neither the certificate of survey nor the patent calls for the watercourse. *Ib.*

29. Want of entry avoids the patent. *Polk v. Wendal*, 9 Cranch, 87.

30. A junior patent on a senior entry will prevail over a senior patent on a junior entry. *Ib.*; *Ross v. Reed*, 1 Wheat, 482.

31. — *Title, how tried — Matters of Evidence.* In Tennessee, the title to land can be tried under a *caveat*, and the judgment binds the holder of an equitable title under one of the parties. *Porterfield v. Clark*, 2 How, 76.

32. The plat and certificate of survey annexed to a patent, and a copy of the entry on which the survey was made, are admissible in evidence for that purpose. *Blake v. Doherty*, 5 Wheat, 359.

33. A general plan made by authority in conformity to law is admissible in evidence, on a question of boundary. *Ib.*

34. But a private survey made by one interested under the grant is inadmissible, as to admit it would enable the grantee to fix a vagrant grant by his own act. *Ib.*

35. To prove the want of entries authorizing the issue of certain warrants, certified copies of warrants from the same office, of the same dates and numbers, but to different persons, and for different quantities of land, held inadmissible otherwise than as parts of the entire abstract, from which the court by inspection might ascertain the non-existence of the contested entries. *Polk v. Wendell*, 5 Wheat, 293.

36. Certificates from the secretary's office to prove that on the entries of the dates of the contested entries other warrants were issued and other grants made in other names, but none to the person claiming under the contested entries, are competent evidence. *Ib.*

37. But parol evidence that the warrants and locations had been rejected by the entry taken as spurious is immaterial and inadmissible. *Ib.*

**LANDS OF STATES — OHIO — Reservation to satisfy Virginia Military Bounty Warrants.**

See LANDS OF UNITED STATES — BOUNTY WARRANTS.

**LANDS OF STATES — PENNSYLVANIA — Title — Pre-emption — Warrant — Survey — Limitation — Virginia Settlement Right.]**

The lands of the former proprietaries that lay within the lines of manors were not confiscated by the state statute of 1779 for vesting their estates in the commonwealth, nor by the act of 1781 for the establishment of a land office. *Kirk v. Smith*, 9 Wheat, 241.

2. A pre-emption right to an island in one of the great rivers of the state could not be obtained by settlement, under either the proprietary or the state government. *Fisher v. Haldeman*, 20 How, 186.

3. A warrant on which a survey has been made, etc., is *functus officio*, and a second survey, unless ordered by the board of property, is invalid and confers no right. *Schuylkill & Dauphin Improvement Co. v. Munson*, 14 Wal, 442.

4. That such an order was made cannot be inferred from the mere fact of survey, and the loss of such an order cannot be presumed, after any lapse of time, without proof that it once existed. *Ib.*

5. Under the statute of April 3, 1792, providing for the sale of vacant lands, and for actual settlement, etc., thereon within two years of the issue of warrant, a warrantee who was prevented by force of the enemies of the United States from making settlement from April, 1793, the date of the warrant, to January, 1796, but who persisted during that time in his efforts to make such settlement, is excused from making it, and has a fee simple in the land, although he did not make such settlement, etc., within two years after such prevention ceased. *Huilekoper v. Douglass*, 3 Cranch, 1.

6. A survey, although unaccompanied by a patent and payment of the consideration, gave a legal right of entry, which supports an ejectment; and that right remains, although originally it may have been held to be so acquired from a defect of equitable powers, and although the courts of the United States now have those powers. *Irvine v. Sims*, 3 Dal, 425.

7. Under the compact of 1780 between Pennsylvania and Virginia, declaring that in disputes concerning titles to land preference should be given to the elder right, a settlement right under the Virginia statute of 1779, held to take date from the time of settlement, and not from that of the certificate. *Marlatt v. Silk*, 11 Pet, 1.

**LANDS OF STATES — TEXAS — Location of Grant — Survey — Conveyance.]**

Under the laws of Mexico, a grant by the governor of Coahuila and Texas, might be located on lands within an empresario contract, by consent of the empresario. *Spencer v. Lapsley*, 20 How, 264.

2. That an empresario contract was amended so as to include the littoral leagues was permitted to be proved by parol, where it appeared that many of the documents concerning it had

**LANDS OF STATES — TEXAS — continued.**

been destroyed during the Texan revolution. *White v. Burnley*, 20 How. 235.

3. That a survey contained much more land than the contract or grant justified, can be taken advantage of by the state alone, and not by an individual adverse claimant. *Ib.*

4. Although, in general, a survey is void, if made out of the county of which the one who makes it is the surveyor, it may be made valid by the approval of the surveyor after the boundary of the county has been extended so as to include the land. *Doswell v. De la Lanza*, 20 How. 29.

5. By the law of the Texan republic, a junior locator of a land warrant was not deemed an innocent purchaser where a map showing a prior survey was deposited in the general land office, nor where he had actual notice of the prior grant. *Cook v. Burnley*, 11 Wal. 659.

6. In Texas, under the Spanish law which formerly prevailed there, a title of possession issued to one assuming to be the attorney in fact of the original grantee, and so described in the title, declaring that it was issued that "the party interested" might own and enjoy the land sold to him, vested title in the grantee and not in the attorney; the original grant by the government being regarded as the foundation of title, and the extension of title on specific land being held to vest title in the original grantee, if made for his benefit. *Hanrick v. Barton*, 16 Wal. 166.

7. Notwithstanding the existence of hostilities between Texas and Mexico, one citizen of Mexico could convey to another lands in Texas, both grantor and grantee then being in Mexico. *Airhart v. Massieu*, 98 U. S. 491.

**LANDS OF STATES — VIRGINIA AND KENTUCKY**

— *Title — Cession of Northwestern Territory.*

See pl. 1-3.

*Pre-emption — Military Warrants, etc.*

See pl. 4-10.

*Entry — Construction of Entries — Equities between Entries — Proof of Objects called for.*

See pl. 11-51.

*Survey — Effect of Survey — Return — Limitation.*

See pl. 52-67.

*Patent — Construction — Conclusiveness and Effect.*

See pl. 68-82.

*Titles, how tried — Various Statutes.*

See pl. 83-87.

1. — *Title — Cession of Northwestern Territory.*] Virginia had no title to lands in the Northwestern territory covered by the possessions of French settlers, and conveyed, as she assumed to convey, none to the United States

**LANDS OF STATES — VIRGINIA AND KENTUCKY — continued.**

on her cession of the territory in 1783. *Langdeau v. Hanes*, 21 Wal. 521.

2. Construction of the Virginia statute of 1783, ceding the land northwest of the Ohio to the United States, and of the statute of the same year for surveying and apportioning the land granted to the Illinois regiment, and the statute of 1790 in amendment thereof. *Hughes v. Clarksville*, 6 Pet. 369.

3. Lord Fairfax at the time of his death had the absolute property, seisin, and possession of the waste and unappropriated lands in the northern neck of Virginia, and the treaty of 1794 confirmed the title thereto in his devisees. [JOHNSON, J., dissenting.] *Fairfax v. Hunter*, 7 Cranch, 603.

4. — *Pre-emption — Military Warrants, etc.*] The Virginia statute giving a right of pre-emption to those who had marked and improved land before 1778, referred that right to the time when the improvement was made and the time of the passage of the act. *Simms v. Guthrie*, 9 Cranch, 19.

5. In a trial of pre-emption rights, the earlier improvement will hold the land as against the earlier certificate, entry, survey, and patent. *Finley v. Williams*, 9 Cranch, 164.

6. Under laws passed by Virginia subsequent to her independence, the assignee of a military right to unappropriated land in America, acquired under a royal proclamation of 1763, by obtaining a warrant and so locating it as to describe a particular parcel of land, obtained a complete equitable title; and the land being on the border, on an island in the Ohio River, that title was confirmed by the subsequent compact between Virginia and Pennsylvania relative to such lands. *Irvine v. Sims*, 3 Dal. 425.

7. A military right to unappropriated land in America, acquired under a royal proclamation of 1763, was made assignable by the law of Virginia to an inhabitant of that state. *Ib.*

8. The vendor of a military land-warrant held to have no equity against his purchaser for land embraced in the survey and the patent obtained thereon in excess of the quantity called for by the warrant. *Vowles v. Craig*, 8 Cranch, 371.

9. The rule in equity which protects *bona fide* purchasers does not apply to the purchasers of military land-warrants under the laws of Virginia, such purchasers being considered as affected with notice by the record of the entry and of the survey. *Kerr v. Watts*, 6 Wheat. 550.

10. The original law of Virginia authorizing the assignment of warrants did not require the assignment to be by indorsement, or by an instrument annexed to the warrant. *Bouldin v. Massie*, 7 Wheat. 122.

11. — *Entry — Construction of Entries — Equities between Entries — Proof of Objects called for.*] Under the land law of Virginia, if by any reasonable construction an entry may be



**LANDS OF STATES — VIRGINIA AND KENTUCKY — continued.**

supported, the courts will support it. *Massie v. Watts*, 6 Cranch, 148.

12. In Kentucky, an entry, to be good, must have such certainty as will enable a subsequent locator, by the use of reasonable care and diligence, to locate the adjacent residuum. *Bodley v. Taylor*, 5 Cranch, 191; *Matson v. Hord*, 1 Wheat. 130; *Johnson v. Pannel*, 2 Wheat. 206; *Shipp v. Miller*, 2 Wheat. 316; *Perkins v. Ramsey*, 5 Wheat. 269; *McDowell v. Peyton*, 10 Wheat. 454; *Littlepage v. Fowler*, 11 Wheat. 215; *Taylor v. Owing*, 11 Wheat. 226. And see *Holmes v. Trout*, 7 Pet. 171.

13. The intention of the locator is to be chiefly regarded in construing an entry; if a call be impracticable, it is rejected as surplusage. *Holmes v. Trout*, 7 Pet. 171.

14. In Kentucky, to constitute a valid entry, one or more leading calls must be notorious, so that an inquirer, by use of reasonable diligence, may find the land; if the leading call be uncertain, and the entry supply no means of controlling it, or rendering it certain, the entry is void. *Garnett v. Jenkins*, 8 Pet. 75.

15. A call for a survey which had not acquired notoriety will not of itself support an entry; but if the survey called for have been made conformably to a valid entry, such a call may be good. *Holmes v. Trout*, 7 Pet. 171.

16. Every material part of an entry is to be considered, and such construction put on the whole as is best adapted to all its material calls. Thus, although generally where a location calls for land to be a given distance from a given point, all of the land must be placed at or beyond that distance, yet it may be placed within it, if other words plainly indicate such a construction. *Johnson v. Pannel*, 2 Wheat. 206.

17. Where the calls of an entry cannot all be answered, such as are vague or incompatible may be controlled by such as are material, consistent, and certain. *Shipp v. Miller*, 2 Wheat. 316.

18. A call for a natural or artificial object will control a call for course and distance. *Holmes v. Trout*, 7 Pet. 171; *Brown v. Huger*, 21 How. 305.

19. But a call for courses and distances will not yield to a call for known, visible, and definite objects, unless the latter is more material and equally certain. *Shipp v. Miller*, 2 Wheat. 316.

20. Course and distance are the only guide, if the natural objects called for are indistinguishable from others of the same kind. *Chinoweth v. Haskell*, 3 Pet. 93.

21. If the monuments called for in an entry under the early land laws of Virginia are uncertain, the courses and distances may identify them, or may dispense with the necessity of identifying some of them, by rendering the whole description, taken together, sufficiently certain. *Marshall v. Currie*, 4 Cranch, 173.

22. Where natural and ascertained objects are

**LANDS OF STATES — VIRGINIA AND KENTUCKY — continued.**

wanting, and course and distance cannot be reconciled, either course or distance may prevail, according to circumstances, there being no general rule that compels the preference of the one to the other. *Preston v. Bowmar*, 6 Wheat. 580.

23. In Kentucky, if a natural object be called for, as about a certain distance from a fixed monument, and the object cannot be found, the call for it is rejected, and the distance mentioned is taken as the precise distance. *Bodley v. Taylor*, 5 Cranch, 191.

24. If a call for a line parallel to another line be repugnant to the call for quantity, it may be disregarded if the call for quantity and the other calls sufficiently identify the land. [McLEAN, J., dissenting.] *Croghan v. Nelson*, 3 How. 187.

25. If both the general or descriptive call and the particular or locative call be not reasonably certain, the entry will be defective. *Johnson v. Pannel*, 2 Wheat. 206.

26. But if the locative call be a call for an unmarked tree, it may be disregarded as immaterial, if the entry be in other respects sufficiently certain. *Id.*

27. In finding a place described in an entry by its distance from another place, the words "about," "nearly," and the like, are to be rejected, if other words do not make their retention necessary, and the distance is to be taken as precisely the distance given. *Id.*

28. If an entry call to run "about a north course for quantity," the word "about" should be rejected and the land run a due north course. *Shipp v. Miller*, 2 Wheat. 316.

29. In taking the distance from one point to another on a large river, the measurement is to be with its meander, and not in a direct line. *Johnson v. Pannel*, 2 Wheat. 206.

30. If an entry be placed on a road, at a certain distance from a given point by which the road passes, the distance will be computed by the meanders of the road, unless there is something to show other intent. *Bodley v. Taylor*, 5 Cranch, 191.

31. An entry with a call for "a spring branch about six miles a northeastwardly course" from a known point, to include a marked tree at the head of the spring, the distance, in fact, being four and a half miles, and the course not northeastwardly, held void for uncertainty. *Shipp v. Miller*, 2 Wheat. 316.

32. A description of land to include marked trees "near the Hunter's trace leading from Bryant's station over to the waters of Hinkston, on the dividing ridge between the waters of Hinkston and the waters of Elkhorn," held so defective as not to sustain an entry. *Matson v. Hord*, 1 Wheat. 130.

33. An entry calling for "the Big Blue Lick" will not support a survey and patent for the Upper Blue Lick, the Lower Blue Lick being generally known as "the Big Blue Lick," al-

**LANDS OF STATES — VIRGINIA AND KENTUCKY — continued.**

though there are calls which seem to designate the Upper Blue Lick. *Finley v. Williams*, 9 Cranch, 164.

34. An entry of land "in the fork of the first fork of Licking" will not support a survey in the first fork of Licking. *Meredith v. Pickett*, 9 Wheat. 573.

35. A call for the settlement and pre-emption of A., before the location of A.'s pre-emption right, is substantially a call for the land of A. *Bodley v. Taylor*, 5 Cranch, 191.

36. If the quantity and one line only are given in the description in an entry of land in Kentucky, the location will be taken to be in the form of a square. *Id.*

37. If no other figure be called for in an entry, it is to be surveyed in a square coincident with the cardinal points, and large enough to contain the given quantity, and the centre of the base line of the square is to be taken as the point of beginning. *Shipp v. Miller*, 9 Wheat. 316.

38. Where a given quantity of land is to be laid off on a given base, it should be in a parallelogram, unless that form would be repugnant to the entry; and where that form is necessarily departed from, the departure should go no further than the calls render necessary. *Massie v. Watts*, 6 Cranch, 148; *Kerr v. Watts*, 6 Wheat. 550.

39. The entry herein was sufficiently certain to satisfy the rule. *Taylor v. Walton*, 1 Wheat. 141.

40. The entry herein held void for want of certainty. *Perkins v. Ramsey*, 5 Wheat. 269.

41. For an entry on a pre-emption warrant to give priority, it need not in terms call for the improvement, if it in fact include it. *Finley v. Williams*, 9 Cranch, 164.

42. In Kentucky, an entry in the name of "the heirs" of a deceased warrant-holder, not naming them, is valid. *Hunt v. Wickliffe*, 9 Pet. 201.

43. A junior entry may limit the survey of an elder entry to its calls. *Holmes v. Trout*, 7 Pet. 171.

44. In Virginia, an entry made subsequently to the plaintiff's patent cannot affect his title. *Stringer v. Young*, 3 Pet. 320.

45. Purchasers under conflicting entries are considered as purchasing under distinct rights, each purchaser as acquiring only the interest of the person who made the entry. *Kerr v. Watts*, 6 Wheat. 550.

46. In Kentucky, where the patent of a subsequent locator embraces land that was included in the prior entry of another party, such locator in equity should convey the legal title of such land to the prior locator, without conveyance from the latter of land embraced in his patent but not within his entry, but within that of the subsequent locator, and by mistake omitted from the survey thereof. *Bodley v. Taylor*, 5 Cranch, 191.

**LANDS OF STATES — VIRGINIA AND KENTUCKY — continued.**

47. The equity of a prior locator in Virginia extends to the surplus land surveyed, as well as to that included in the warrant. *Taylor v. Brown*, 5 Cranch, 234.

48. Parol testimony is admissible to prove the existence and location of objects called for, but not to construe or explain the words of the entry. *Meredith v. Pickett*, 9 Wheat. 573.

49. A locator under a warrant undertakes to find vacant land, and acts on his own risk. *Taylor v. Brown*, 5 Cranch, 234.

50. An entry by the assignee of a pre-emption right will be good, although the name of the assignor be not mentioned, if the entry refer to the warrant, mention an improvement, and describe the locus with sufficient certainty in other respects. *Simms v. Guthrie*, 9 Cranch, 19.

51. A warrant and survey constitute only an equitable title, which, until consummated by patent, remains subject to examination. *Miller v. Kerr*, 7 Wheat. 1.

52. — *Survey — Effect of Survey — Return — Limitation.* Under the Virginia land law of 1779 a survey without an entry was not an appropriation, and gave no title. *Wilson v. Mason*, 1 Cranch, 45.

53. Under the land law of Virginia the title begins, if it begin without an entry, with the survey; and it is not defeated by the neglect of the surveyor to record the survey pursuant to the act of 1748, the act being, in regard thereto, merely directory. *Taylor v. Brown*, 5 Cranch, 234.

54. A survey is an appropriation of all the land it includes, although it include surplus land; and it cannot be reduced by a caveat under the Virginia statute of 1779. *Id.*

55. The surveys actually made on the military land-warrants of Virginia have not the force of judicial acts, or of acts done by the deputations of officers as general agents of the continental officers. *Kerr v. Watts*, 6 Wheat. 550.

56. Section 6, Virginia statute of 1748, "directing the duty of surveyors of lands," being merely directory to the surveyor, mere neglect to run and mark some of the lines on the ground, the survey being closed by resort to adjoining surveys, or otherwise, will not invalidate the warrant-holder's title. *Craig v. Radford*, 3 Wheat. 594.

57. A question whether the compact of 1789, between Virginia and Kentucky, restrained the legislature of the latter from prolonging the time for surveying one entry to the prejudice of another. *Miller v. McIntire*, 11 Wheat. 441.

58. In Kentucky, a survey is not avoided by an inclusion therein of more land than the warrant calls for. *Holmes v. Trout*, 7 Pet. 171.

59. The plaintiffs herein held to be within the saving of the Kentucky statute of 1797, giving further time to the owners of land to survey the same. *Miller v. McIntire*, 11 Wheat. 441.

LANDS OF STATES — VIRGINIA AND KENTUCKY — *continued.*

60. The Kentucky statute of 1797, allowing infants and *feme coverts* but three years after removal of disability to complete surveys on entries of land, is not a statute of limitation merely, but also a saving of forfeiture, and should be strictly construed against the state. Thus, if one of several joint owners be under disability of infancy, the statute will not begin to run as against any of them until such disability is removed. *Shipp v. Miller*, 2 Wheat. 316.

61. A locator may survey his entry in one or more surveys, or he may withdraw a part of his entry, at pleasure. *Holmes v. Trout*, 7 Pet. 171.

62. A survey made by the deputy surveyor is, in law, to be considered as made by his principal. *Craig v. Radford*, 3 Wheat. 594.

63. The certificate of a surveyor that a survey has been made by virtue of a warrant is sufficient evidence that the warrant was in the surveyor's possession when the survey was made. *Taylor v. Brown*, 5 Cranch, 234; *Craig v. Radford*, 3 Wheat. 594.

64. In Virginia, the return of the surveyor into the office is the only legal identification of the land on which the right of the individual attaches. *Russell v. Transylvania University*, 1 Wheat. 432.

65. In Virginia, the omission of the surveyor to record the survey will not invalidate the title, the provision of the statute which requires survey being merely directory. *Stringer v. Young*, 3 Pet. 320.

66. In Kentucky, a survey is presumed to be recorded on the expiration of three months from its date, and a dependent entry of adjoining land is entitled to the notoriety of the survey as a matter of record. *Elmendorf v. Taylor*, 10 Wheat. 152.

67. The return of a survey, made by the principal surveyor from the field-notes of an assistant who made the survey but died before making a plat and certificate, is not invalid under section 46 of the Virginia statute "for settling the titles and bounds of lands," etc., which requires every survey to "be made and returned by a sworn surveyor." *Taylor v. Brown*, 5 Cranch, 234.

68. — *Patent — Construction — Conclusiveness and Effect.* Under the land law of Virginia a patent gives seisin in deed, and so does a private conveyance of wild land. *Green v. Liler*, 8 Cranch, 229.

69. In Kentucky, a patent gives legal title; what precedes it is equitable only. *Id.*

70. In Virginia no inquiry can be made at law into the regularity of the prerequisites of a patent valid on its face. *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Pet. 328.

71. Where a patent for land in the Virginia reservation in Ohio is founded on an assignment of a certificate of a military right, a court of equity may inquire into an alleged fraud in the assignment, and, on finding it to be fraudulent, decree the holder of the legal title to hold as

LANDS OF STATES — VIRGINIA AND KENTUCKY — *continued.*

trustee for the equitable owner. *Brush v. Ware*, 15 Pet. 93.

72. In Kentucky, a court of law will not look beyond the patent, but a court of equity will give effect to an elder entry as against an elder patent. *Finley v. Williams*, 9 Cranch, 164; *Hunt v. Wickliffe*, 2 Pet. 201.

73. In Virginia, misnomer in the patent, of the county in which the patent describes the land as lying, is open to explanation, and does not, *per se*, avoid the grant. *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Pet. 328.

74. The patent relates in equity to the inception of the title, and he who first appropriates the land has the best equitable title, if it be not impaired by other circumstances. *Taylor v. Brown*, 5 Cranch, 234.

75. A grant by the lord proprietor is not invalidated by the fact that the location and survey were made in a name other than that in the grant. *Brown v. Huger*, 21 How. 305.

76. In Kentucky, a patent which declares that lands entered for others are within the same bounds, but that their "claims have been excluded in the calculation of the plot," gives no title to the land included in such entries, but is valid for the residue. *Scott v. Ratliffe*, 5 Pet. 81.

77. If a subsequent locator, by his patent, cover land included in a prior entry, he may be compelled in equity to convey the legal title to the prior locator. *Johnson v. Pannel*, 2 Wheat. 206; *Shipp v. Miller*, *Id.* 316.

78. The entire description in a patent must be reasonably construed to ascertain the identity of the land; and although a call be erroneous and repugnant, if, after rejecting it, enough remain to identify the land, the patent is not void. *Boardman v. Reed*, 6 Pet. 328.

79. A patent from the state of Kentucky for land in the Indian territory held to pass the title, subject to the Indian right of occupancy. *Clark v. Smith*, 13 Pet. 195.

80. Where the construction is doubtful, the claim of the party in possession should prevail. *Preston v. Bowmar*, 6 Wheat. 580; *Garnett v. Jenkins*, 8 Pet. 75.

81. Where a river is given as one of the boundaries, the grant extends to the river and follows its course. *Brown v. Huger*, 21 How. 305.

82. A reservation in a patent issued under the Virginia statute of June 2, 1788, authorizing grants with reservation of claims to land included in surveys then made, excludes from the operation of the patent land held by prior claimants at the date of the survey by any title, either inchoate or perfect. *Armstrong v. Morrill*, 14 Wal. 120.

83. — *Titles, how tried — Various Statutes* ] In Virginia and Kentucky, the title to land can be tried under a *caveat*, and the judgment binds the holder of an equitable title under one of the parties. *Porterfield v. Clark*, 2 How. 76.

**LANDS OF STATES — VIRGINIA AND KENTUCKY — continued.**

84. One who "claims land as locator," within the meaning of the Kentucky statute of December 16, 1802, is one who claims under a contract with a warrant-holder to locate the warrant for a portion of the land thereby secured. *Hollingsworth v. Barbour*, 4 Pet. 466.

85. Under the Kentucky statute of 1798 concerning champerty and maintenance, a deed will pass title, notwithstanding an adverse possession. *Walden v. Gratz*, 1 Wheat. 292.

86. Under the Virginia land law of 1779, the remedy by *caveat* belonged to one who obtained a better title after, as well as before, another conflicting survey. *Wilson v. Mason*, 1 Cranch, 46.

87. A private statute of Virginia confirming the title of alien heirs to land for which their ancestor had a patent, held valid as against a junior patent authorized to be issued for unappropriated land only, issued before the passage of that act. *Gouverneur v. Robertson*, 11 Wheat. 332.

*Reservation to satisfy Military Land Warrants, etc.*

See LANDS OF UNITED STATES — BOUNTY WARRANTS.

**LANDS OF STATES — WISCONSIN — School Lands — Grants thereof.**

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 20.

**LANDS OF UNITED STATES — Bounty Warrants — Location — Virginia Reservation, etc.**

See LANDS OF UNITED STATES — BOUNTY WARRANTS.

*Conflicting Claims thereto — In general.*

See LANDS OF UNITED STATES — CONFLICTING CLAIMS.

*Disposal, in general — Power of Congress — Reservation — Survey — Sale, etc.*

See LANDS OF UNITED STATES — DISPOSAL.

*Grants by Congress — For Schools — Railroads — Swamp Lands — Oregon Donation, etc.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS.

*Grants from Former Governments, France, Spain, Mexico, etc. — Treaties and Confirmations, in general.*

See LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS.

*Issue and Delivery of Patent — Construction — Impeachment, etc.*

See LANDS OF UNITED STATES — PATENT.

*Land Office — Officers — Records, etc. — In general.*

See LANDS OF UNITED STATES — LAND OFFICE.

**LANDS OF UNITED STATES — continued.**

*Mineral Lands — In general.*

See LANDS OF UNITED STATES — MINERAL LANDS.

*New Madrid Certificates — Location, etc.*

See LANDS OF UNITED STATES — NEW MADRID CERTIFICATES.

*Pre-emption — In general.*

See LANDS OF UNITED STATES — PRE-EMPTION.

*Timber on Public Lands — Cutting, etc.*

See LANDS OF UNITED STATES — TIMBER.

*Title — Origin — Lands in New States, etc.*

See LANDS OF UNITED STATES — TITLE.

**LANDS OF UNITED STATES — BOUNTY WARRANTS — What Lands subject to Location — Lands in the Virginia Reservation, etc.**

See pl. 1-6.

*When and how acquired — Entry — Survey — Patent.*

See pl. 7-34.

1. — *What Lands subject to Location — Lands in the Virginia Reservation, etc.*] Under the reservation in the cession from Virginia, and under the acts of August 10, 1790 (1 Sts. 182), and of June 9, 1794 (1 Sts. 394), all the land between the Scioto and the Little Miami rivers was subjected to the military warrants, to satisfy which the reservation was made. *Doddridge v. Thompson*, 9 Wheat. 469.

2. That territory included all the land between those rivers from their sources to their mouths; and the main branch of each, where no other had acquired the exclusive name, was to be considered as the river. *Id.*

3. The act of June 26, 1812 (2 Sts. 764), which provisionally designated Ludlow's line as the western boundary of that tract, did not invalidate titles, previously acquired under military warrants, between that line and Roberts's line. *Id.*

4. No act prior to that of 1812 withdrew the land between Ludlow's and Roberts's line from the territory liable to survey for military warrants. *Id.* And see *Reynolds v. McArthur*, 2 Pet. 417.

5. By the act of March 2, 1807 (2 Sts. 424), lands in the Virginia military land district, patented in the names of deceased persons, were withdrawn from location; and by the act of May 20, 1836 (5 Sts. 31), such defects were cured, and the titles vested in the heirs of the deceased patentees. *Galloway v. Finley*, 12 Pet. 264.

6. The previous surveys, location within which was avoided by the proviso of section 1 of that act, are subsisting surveys in which an interest is claimed. *Taylor v. Myers*, 7 Wheat. 23.

7. — *When and how acquired — Entry — Survey — Patent.*] The United States had a right to prescribe the time within which Virginia military warrants might be located on lands

**LANDS OF UNITED STATES — BOUNTY WARRANTS — continued.**

northwest of the Ohio, and to annex conditions to the extension of the time. *Jackson v. Clark*, 1 Pet. 628.

8. Although an entry must have such certainty that a subsequent locator may locate the adjacent residuum, a description that will identify the land is sufficient for the validity of a grant. *McArthur v. Browder*, 4 Wheat. 488.

9. To support an entry, the person claiming thereunder must prove that the objects called for are so described or are so notorious that others, by using reasonable diligence, could readily find them. *Watts v. Lindsey*, 7 Wheat. 158.

10. Under the act of 1794, a patent for a part of the land embraced in the warrant might be issued to an assignee. *Bouldin v. Massie*, 7 Wheat. 122.

11. Proof of the assignment might be made in the surveyor's office, and certified by the surveyor to the officer issuing the patent. *Ib.*

12. Although the act of March 3, 1803, § 8 (2 Sts. 237), required one seeking a patent under a lost Virginia military warrant to produce a certified duplicate thereof, yet, as that was to protect the government from fraud, a third person cannot take advantage of the non-production of such duplicate, there having been a certified copy on file in the land office. *Ib.*

13. Reference to the certificate in a warrant for military land does not amount to notice of an irregularity on the face of the certificate; and if the purchaser of such a warrant took it subject to any infirmity on account thereof, his title would become good on issue of patent. *Hoofnagle v. Anderson*, 7 Wheat. 212.

14. The possession of the warrant, and recognition by the surveyor of the right of the holder to act for the owner, are equivalent to a letter of attorney, and empower him to make, alter, or withdraw the entry, and to direct the survey; but such authority is terminated by the death of the owner. *Galt v. Galloway*, 4 Pet. 332.

15. Under the laws applicable to the Virginia military lands in Ohio, a warrant may be withdrawn after a survey has been made and recorded. *Ib.*

16. An entry made in the name of a deceased person is void. *McDonald v. Smalley*, 6 Pet. 261. And see *Galt v. Galloway*, 4 Pet. 332.

17. An amended entry retains its original character so far as it is not altered; so far as it is altered, it is a new entry. *McArthur v. Browder*, 4 Wheat. 488.

18. The owner of a survey, made in conformity with his entry, and not interfering with any other person's right, may abandon his survey, after it has been recorded. *Taylor v. Myers*, 7 Wheat. 23.

19. Where a Virginia military land warrant calling for no specific tract was carried into survey and patent of land a part of which had been previously granted to another, and the entry for

**LANDS OF UNITED STATES — BOUNTY WARRANTS — continued.**

that part of the land was withdrawn, it was held that the warrant was not thereby so satisfied or merged that a new and effective entry of other land might not afterwards be made thereon. *Niswanger v. Saunders*, 1 Wal. 434.

20. The act of 1807 was intended to cure defects in entries and surveys, which had occurred without fraud, in the pursuit of a valid title, but not to give validity to titles under Virginia land-warrants, not within the reservation made by that state in the act of cession of lands northwest of the Ohio. *Lindsey v. Miller*, 6 Pet. 666.

21. A warrant issued under a resolution of the general assembly of Virginia, before the act of cession, for services in the continental line, is within that act, although not purporting to be issued under such resolution, and although the term of service was not as great as required by the law in force when the resolution was passed. *Wallace v. Parker*, 6 Pet. 680.

22. The act of 1807 extends to every case that comes within the reservation by Virginia in her act of cession. *Ib.*

23. Under that act a defective survey of such land protected it from being patented under a subsequent warrant and survey by one claiming under the United States. *Jackson v. Clark*, 1 Pet. 628.

24. A location and survey within the reservation for Virginia military warrants, made in contravention of the proviso to § 2, act of March 1, 1823 (3 Sts. 772), held void, although the conflicting entry was made in 1822 in the name of a person then deceased. *McArthur v. Dun*, 7 How. 262.

25. Under the act of March 23, 1804, § 3 (2 Sts. 274), providing for the return within five years of surveys of land in the Virginia military land district, which provision was in effect repeated in subsequent statutes down to and including the act of February 20, 1850 (9 Sts. 421), a location and a survey of lands in that district under a Virginia military land warrant did not give even an equitable title thereto. *Fussell v. Gregg*, 113 U. S. 550.

26. The act of March 3, 1855 (10 Sts. 701), allowing two years within which to make return of surveys of entries made before January 1, 1852, had no application in case of surveys made before that date. *Ib.*

27. Nor had the act of May 27, 1880, § 3 (21 Sts. 142), adding a year to the time limited by the act of 1855. *Ib.*

28. Section 2 of that act, relating to surveys returned to the "land office," meant the general land office, not the office of the district. *Ib.*

29. The act of March 5, 1816 (3 Sts. 256), granting bounties of land to American citizens residing in Canada, has no necessary connection with the bounty land acts of 1811 and 1812, and warrants delivered thereunder to be located by

# LANDS OF UNITED STATES — BOUNTY WARRANTS — continued.

the owners were assignable after entry. *French v. Spencer*, 21 How. 228.

30. A deed which professed to convey the land, and also to be a power of attorney to locate the warrant in the name of the grantee, was valid, and conveyed the land really entered and located, the location of the warrant being sufficient for identification. *Ib.*

31. A patent afterwards issued to the original beneficiary inured, through relation to the date of the entry, to his grantee. *Ib.*

32. It also inured to his benefit on the principle of estoppel, the deed having set forth seisin of the particular estate which it purported to convey, and the adverse claimants being the heirs of the grantor. *Ib.*

33. The act of May 22, 1826 (4 Sts. 190), providing for the surrender of patents issued under the bounty act of May 6, 1812 (2 Sts. 728), where the land proved to be unfit for cultivation, and for the selection of other land in lieu thereof, is not to be construed in connection with the latter act so as to preclude an assignment of the right to land after the surrender of the original patent and before the issue of the new one. *Maxwell v. Moore*, 22 How. 185.

34. Under the act of August 31, 1852 (10 Sts. 143), authorizing the issue of land scrip to the holders of outstanding military land warrants, the secretary of the interior is to determine who are entitled to its benefit; and the courts cannot interfere by injunction with the discharge of that duty on the ground that he is about to issue to one person scrip to which another has a better right. *Walker v. Smith*, 21 How. 579.

*Location gives Vested Interest.*

See LANDS OF UNITED STATES — CONFLICTING CLAIMS, 53.

# LANDS OF UNITED STATES — CONFLICTING CLAIMS — *Claims to Legal Titles.*

See pl. 1-21.

*Claims to Titles both of which are equitable.*

See pl. 22-30.

*Claims to Titles one legal and one equitable.*

See pl. 31-59.

*Claims not open to Judicial Inquiry.*

See pl. 60-70.

1. — *Claims to Legal Titles.*] A patent from the United States does not affect a pre-existing title in a third person. *New Orleans v. De Armas*, 9 Pet. 223.

2. Although at law the patent is the foundation of title and the entry not to be considered, a junior patentee claiming under an elder entry may have relief in equity. *McArthur v. Browder*, 4 Wheat. 488.

3. Where both parties claim under patents, the court as a court of equity will inquire into

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# LANDS OF UNITED STATES — CONFLICTING CLAIMS — continued.

the equities on which the patents were founded. *Barnard v. Ashley*, 18 How. 43.

4. A patent reserving the rights of settlers in Peoria under the acts of May 15, 1820, and March 3, 1823 (3 Sts. 605, 786), held to confer no title as against such a settler, although claiming under a patent of subsequent date. *Ballance v. Forsyth*, 13 How. 18.

5. Where a claim was favorably reported under those acts, and a survey made in 1840 and a patent issued in 1845, the title was held to relate back to 1823, and to be superior to a patent on an ordinary entry, issued in 1838, which contained a reservation of the rights of all persons claiming under the act of 1823. *Bryan v. Forsyth*, 19 How. 334. And see *Gregg v. Tesson*, 1 Black, 150; *Dredge v. Forsyth*, 2 Black, 563; *Kellogg v. Forsyth*, 2 Black, 571.

6. But otherwise where the prior patent contained no such reservation, and was issued to a pre-emptor who had been several years in possession. *Hall v. Papin*, 24 How. 132.

7. A donation certificate, under the act of March 3, 1803 (2 Sts. 229), gives a title superior to that acquired by a purchase at a public land sale. *Ross v. Barland*, 1 Pet. 655.

8. Such certificate need be in no particular form: it is sufficient if it show the occupancy required by the act, and the land granted. *Ib.*

9. A confirmation of a Spanish concession in 1836 gave a title good as against a patent issued on a location of a New Madrid certificate made in 1818. *Easton v. Salisbury*, 21 How. 426.

10. Where a patent is issued on a claim without any certain limits, reserving "all valid adverse rights," a second patent to another claimant for a portion of the same land is valid and operates to convey the title. *Maguire v. Tyler*, 8 Wal. 650.

11. Under the act of May 24, 1828, § 2 (4 Sts. 298), a decree of the supreme court made in 1836, on a petition filed in 1824, confirming an inchoate Spanish title, cannot, by relation to the time of the filing of the petition, devast a title to land not reserved from sale, derived from the United States under an entry made in 1834. *McCabe v. Worthington*, 16 How. 86.

12. A controversy between claimants of land in California under conflicting patents of the United States, issued on confirmation of grants made by the Mexican government, each of which reserves the rights of other parties, must be settled by determining which gives the better right; and the character of the original concessions must be inquired into. *Henshaw v. Bissell*, 18 Wal. 255.

13. A patent issued on a grant of land capable of specific identification confers a better right than one based on a floating grant, although the floating grant was first surveyed and patented. *Ib.*

14. A patent issued on October 12, 1812, founded on an entry made in 1810, on a Virginia

**LANDS OF UNITED STATES — CONFLICTING CLAIMS — continued.**

military land warrant for land between Ludlow's and Roberts's lines, held valid as against a claim under a sale made by the United States in 1813. *Reynolds v. McArthur*, 2 Pet. 417.

15. Where the contest in ejectment is between conflicting confirmations of Spanish grants, the elder confirmation and survey must prevail, and the jury cannot consider whether the survey and patent correspond with the confirmation. *Willot v. Sandford*, 19 How. 79.

16. Where the commissioner decides in favor of one pre-emptor and the secretary, on the same facts, but a different construction of the law, decides in favor of another, and a patent issues to each, a court of equity, as in other cases where title has passed from the government, may inquire and determine whether one party does not hold in trust for the other. [CLIFFORD, J., dissenting.] *Johnson v. Towsley*, 13 Wal. 72.

17. And so, although the decision in favor of the claimant, who on a proper construction of the law has the better right, is not followed by patent. *Samson v. Smiley*, 13 Wal. 91.

18. Where congress by resolution granted land subject to the president's approval, the title of the grantee became absolute on the issue of the president's order of approval, had relation back to the date of the passage of the resolution, and so took precedence of an intermediate patent to another. *Republican River Bridge Co. v. Kansas Pacific Railway Co.*, 92 U. S. 315.

19. A patent issued under the act of September 23, 1850 (9 Sts. 519), granting swamp lands, and making it the duty of the secretary of the interior to identify and make lists of them, and to cause patents to issue, cannot be impeached in an action at law, by showing that the land which it conveys was not in fact swamp and overflowed land. The decision of the department is conclusive, unless grounds exist for attacking it in equity. *French v. Fyan*, 93 U. S. 169.

20. Evidence, whether parol or documentary, which shows a want of power in officers who issue a patent, is admissible in an action at law to defeat a title thereunder, the patent in such case being not merely voidable, but void, and the party, therefore, not obliged to resort to a court of equity to have it so declared. *Sherman v. Buick*, 93 U. S. 209.

21. Under the act of March 3, 1853 (10 Sts. 244), providing for the survey, pre-emption, and sale of lands in California, if a settler on sixteenth and thirty-sixth sections thereby granted to the state for school purposes fail to make good his claim within three months after the return of the plats of the surveys to the local land-office, the title to the land embraced by his settlement vests in the state as of the date of the completion of the surveys. One, therefore, claiming under the United States, under an act passed after the state thus acquired title, has no title as against the

**LANDS OF UNITED STATES — CONFLICTING CLAIMS — continued.**

state's grantee. *Natoma Water & Mining Co. v. Bugbey*, 96 U. S. 165.

22. — [Claims to Titles both of which are equitable.] A certificate under the act of February 17, 1815 (3 Sts. 211), for the relief of sufferers by earthquake in New Madrid County, Missouri, was located on land covered by an inchoate Spanish title, before the bar to that title created by neglect to file the evidence thereof required by the act of March 3, 1807 (2 Sts. 440), and previous acts was removed by the act of May 26, 1824 (4 Sts. 52); and a patent pursuant thereto was issued after the bar was removed. It was held that congress in removing that bar might impose conditions giving a preference to titles acquired while it was in existence; and that the title acquired under such location and patent was protected as against such inchoate title by the act removing that bar, and the act of May 24, 1828 (4 Sts. 298), in addition thereto. *Barry v. Gamble*, 3 How. 32.

23. An owner of an inchoate Spanish title never had any standing in court unless conferred on him by the political power; and as between two such claimants that power could determine which should have title. *Les Bois v. Bramell*, 4 How. 449.

24. A location under a New Madrid certificate cannot prevail against a subsequently confirmed Spanish concession, notice whereof had been given pursuant to the act of March 3, 1811, § 10 (2 Sts. 665). *Bissell v. Penrose*, 8 How. 317; *Mills v. Stoddard*, 8 How. 345.

25. The owner of land in Louisiana, fronting on the Mississippi, obtained a certificate for back land which he was not entitled to either by the act of the public surveyor or by his equitable right to a protraction of his side lines. It was held that his title was invalid as against an adjoining proprietor who had a right to enter and purchase the land under the act of June 15, 1832 (4 Sts. 534), and did so enter and purchase. *Jourdan v. Barrett*, 4 How. 169.

26. A selection of lands under a grant by congress to a territory, held not to impair the right of a pre-emptor who had proved his right before the grant was made. *Lytle v. Arkansas*, 9 How. 314.

27. Where two grants for specific quantities of land were without designation of location except as within general boundaries including a much larger quantity, priority of location by occupation and settlement under a provisional license was held to give the second grantee an equity superior to that of the prior grantee in the location by survey. *United States v. Armijo*, 5 Wal. 444.

28. Where the same land was confirmed to two different persons, but neither of them had received a patent, the state court, in an action for possession, properly inquired into the equities prior to confirmation. *Berthold v. McDonald*, 22 How. 334.

**LANDS OF UNITED STATES — CONFLICTING CLAIMS — continued.**

29. And, it having held that the prior confirmation was void as against the second, because a deed on which it was founded was forged and fraudulent, and never recognized by the owner of the right, the supreme court affirmed the judgment. *Ib.*

30. At the time of the acquisition of California by the United States, the title of the pueblo lands in San Francisco was unperfected and was such as the United States might have refused to recognize. Until 1864, congress took no action concerning these lands. Until 1863, there was no statute of limitations in California affecting titles derived from the Spanish or Mexican government before their final consummation by the United States. One, therefore, who entered upon these lands, without title, in 1852, could not, under a claim of adverse possession, hold them as against one claiming under an alcalde grant. *Palmer v. Low*, 98 U. S. 1.

31. — *Claims, one legal and one equitable.* A mere right to enter land for military services, no particular land having been appropriated, is not such a prior equity as will enable its holder to set aside a patent regular on its face. *Hoofnagle v. Anderson*, 7 Wheat. 212.

32. Whatever the outstanding equities, the patentee has the legal title, and a state law cannot confer on the equitable owner a right to maintain ejectment against him. [McLEAN and McKINLEY, JJ., dissenting.] *Bagnell v. Broderick*, 13 Pet. 436.

33. A patent which, by reason of a void survey and division, appropriates to one pre-emption claim what belongs to another is void as against the owner of the latter claim. [TANEY, C. J., and CATRON and DANIEL, JJ., dissenting.] *Brown v. Clements*, 3 How. 650.

34. An equitable Spanish title, not confirmed by the United States, cannot prevail against a legal title acquired from the United States. *United States v. King*, 3 How. 773.

35. The owner of an inchoate Spanish title to land in Missouri who had not presented his claim to the commissioners nor to the district court for confirmation before May 29, 1829, was barred by subsequent confirmation by congress of another claim. *Les Bois v. Bramell*, 4 How. 449.

36. An incomplete Spanish title confirmed by the act of July 4, 1836 (5 Sts. 126), cannot prevail against a patent issued before the passage of that act. *Menard v. Massey*, 8 How. 293.

37. A title by pre-emption, under the act of May 29, 1830 (4 Sts. 420), held superior to titles under floating rights under the acts of July 14, 1832, and June 19, 1834 (4 Sts. 603, 678), and patents for the latter set aside in equity. *Cunningham v. Ashley*, 14 How. 377.

38. If one enter public land as the agent of another, and pay for it with the other's money, but take the patent certificate in his own name,

**LANDS OF UNITED STATES — CONFLICTING CLAIMS — continued.**

he will hold as trustee for his principal. *Irvine v. Marshall*, 20 How. 558.

39. A territorial statute abolishing resulting trusts in certain cases cannot affect the liability of one who has purchased public lands for another and with the other's money, but has taken the patent certificate in his own name, to account in a federal court as the trustee of his principal. [CATRON, NELSON, GRIER, and CAMPBELL, JJ., dissenting.] *Ib.*

40. A *bona fide* purchaser from the patentee has a title good in equity as against a complainant who made the entry, and was therefore equitably entitled to the patent. *Lea v. Polk County Copper Co.*, 21 How. 493.

41. Where a grant has been confirmed and the land surveyed, and a patent issued to the grantee, the correctness of the survey cannot be disputed by defendants in ejectment who are in possession claiming under a title not perfected by survey and patent. *Greer v. Mezes*, 24 How. 268.

42. Relief was refused to a purchaser of a claim under a prior entry, as against a grantee of the patentee, sixteen years after issue of the patent, where the claim had lain dormant all that time, and there had been a great advance in values. *Harkness v. Underhill*, 1 Black, 316.

43. A contract that one of the parties shall make a pre-emption entry for the benefit of both on false proof of settlement, although performed and possession taken, will not estop the other party from setting up title under a subsequent *bona fide* settlement and entry. *Ib.*

44. The equity of a pre-emption claimant who has paid the purchase-money, received the usual certificate, and taken and maintained possession, cannot be defeated by a subsequent entry supported by a patent. *Hughes v. United States*, 4 Wal. 232.

45. Confirmation of a claim under the act of March 3, 1851 (9 Sts. 634), does not affect the equities of third persons, but merely confers a legal title on the confirmee. *Townsend v. Greeley*, 5 Wal. 326.

46. If relief be sought on the ground that a patent was issued to one person, when the right was in another, the decree should not annul the patent, but provide for a transfer of title to the person equitably entitled to it. *Silver v. Ladd*, 7 Wal. 219.

47. A decree under the act of March 3, 1851 (9 Sts. 633), to ascertain and settle private claims to land in California, confirming a claim under a Mexican grant even when followed by a patent, did not conclude the equitable rights of third persons, but left them to assert their rights by suit in equity against the patentee and persons claiming under him with notice; the intent of that act being only the separation of the land of individuals from the public domain. *Meador v. Norton*, 11 Wal. 442.



**LANDS OF UNITED STATES — CONFLICTING CLAIMS — continued.**

48. An ejectment on a title under a patent from the United States is not barred under a state statute by an adverse possession held prior to the issue of the patent and while the plaintiff or his grantor had only an equity, and this, although by the statute an action lies on an equitable right, and notwithstanding the doctrine of relation by which a patent is held to take effect as of the date of the inception of title; for that doctrine rests on a fiction of law adopted for the purposes of justice, and is applied only for the protection of persons who stand in privity with him who acquired the equity; and to give effect to such an adverse right would interfere with the power of congress to dispose of the public lands. [DAVIS and STRONG, JJ., dissenting.] *Gibson v. Chouteau*, 13 Wal. 92.

49. Confirmation of the Mexican grant of land in California segregates the land, when surveyed, from the public domain, and invests the confirmer with the legal title, and against that title no equity can avail at law. *Carpentier v. Montgomery*, 13 Wal. 490.

50. But the equities of third persons under that title are not cut off, but may be enforced in equity against the confirmer or his assigns with notice, who are deemed in such case to hold in trust. *Id.*

51. The Oregon donation act of September 27, 1850 (9 Sts. 496), does not deny, but impliedly recognizes, the validity of contracts made by actual settlers concerning their possessory rights to public lands in that territory. A contract, therefore, made by such a settler for the sale of such lands, is binding on his heirs who acquire title by patent issued after his death; and this, whether the husband or wife who takes as survivor under that act takes by purchase or by inheritance. *Lamb v. Davenport*, 18 Wal. 307.

52. Before the federal laws were extended over Oregon, the settlers, having formed a provisional government, occupied, cultivated, improved, bought, and sold land as though they owned it, in the belief that the federal government would ratify their dealings and confirm their title accordingly. Before the passage of the donation act, all transactions in land were affected with that understanding. A purchaser under these circumstances from a claimant, or a person whose purchase from another had been confirmed by the claimant acquired, as against the claimant, an equitable right which a court would enforce after his acquisition of a patent from the United States; and such equitable right passed to his grantees. *Stark v. Starr*, 94 U. S. 477, 492; *Stark v. Bacon*, *Id.* 492.

53. A patent issued on an entry made on surveyed public land on which a location of a military bounty land-warrant has been duly made by another and neither vacated nor set aside, is void, the entry of land in which such a

**LANDS OF UNITED STATES — CONFLICTING CLAIMS — continued.**

vested interest has been acquired and maintained being unauthorized by law. *Wirth v. Branson*, 98 U. S. 118.

54. One who seeks the aid of a court of equity to declare a trust in his favor in land held under a patent from the United States must set forth clearly the acts of the defendant relied on as constituting fraud on which the claim to relief is based. Loose, untraversable allegations of fraud will not avail. *Marquez v. Frisbie*, 101 U. S. 473.

55. The fraud, moreover, must have been such as to have prevented a full exhibition of the case to the officers of the land department. The introduction of testimony, even though false, which there was ample opportunity to meet and overcome, and fraudulent acts discovered before the hearing in the department, afford no ground on which to base a claim to have the decision of the department reviewed by the courts. *Vance v. Burbank*, 101 U. S. 514.

56. Where a survey and a patent thereon are founded on a superior Mexican grant, the rights of a party thereunder are not concluded by a prior survey to other claimants. *Adam v. Norris*, 103 U. S. 591.

57. Where a plaintiff in equity contends that the defendant holds for him the legal title to public land, but can show neither the receipt of the receiver for the purchase-money alleged to have been paid by the plaintiff's grantor, nor the register's certificate of purchase entitling such grantor to a patent, nor account for the loss thereof, and where, moreover, the evidence strongly tends to show that such papers never existed, and that the grantor never purchased the land, the bill will be dismissed. *Simmons v. Ogle*, 105 U. S. 271.

58. The patent of the United States passes the legal title. In ejectment, that title must prevail, without regard to equitable rights, such as ownership by "superiority of possessory title and priority of actual possession." *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447.

59. Where those claiming under a patent for public land have a right prior in every respect to one claiming independently of the patent, such later claimant can assert no equity which will defeat the legal title. *Quinn v. Chapman*, 111 U. S. 445.

60. — *Claims not open to Judicial Inquiry.* Under the act of May 20, 1826 (4 Sts. 179), granting lands for the support of schools, a decision by the secretary of the treasury, between school trustees and a claimant under a private entry, that the land was duly selected and set apart under the statute, was final. *Campbell v. Doe*, 13 How. 244.

61. A patent, pursuant to statute authorizing its issue, relinquishing the right of the government to certain land, but providing that it shall not affect the rights of third persons nor pre-

# LANDS OF UNITED STATES — CONFLICTING CLAIMS — continued.

clude a judgment between private claimants, allows a judicial inquiry into the merits of opposing claims. *White v. Cannon*, 6 Wal. 443.

62. Where two claimants set up distinct imperfect titles under the former government to the same parcel of land, the political power alone is competent to determine to which the perfect title shall be made: the courts have no jurisdiction to determine the controversy. *Maguire v. Tyler*, 8 Wal. 650.

63. In ejectment in California, where one party asserts title under a confirmed Mexican concession and an approved survey, and the other, title under a patent issued on a like concession, the court must inquire into the original concessions, and if that do not suffice, into the proceedings before the federal tribunals. *Miller v. Dale*, 92 U. S. 473.

64. The object of proceedings in the federal tribunals under that act, for the approval of surveys of confirmed claims, was not to settle any question of title against other claimants, but to insure conformity of the survey with the decree of confirmation. *Ib.*

65. It is only after the United States has parted with its title to public lands that the equities of others than the grantee, and subject to which he holds the title, may be enforced by the courts. Pending the action of the officers of the land department, the courts cannot act. *Marquez v. Frisbie*, 101 U. S. 473.

66. The decision of officers of the land department on the question of which of two claimants is entitled to a patent for public land, can be set aside by the courts only when it is apparent that the decision was based on a mistake of law alone. If the mistake was one of fact, or of law and fact so mixed that the mistake of law cannot be seen clearly, the decision will be held conclusive. *Ib.*

67. In contests between claimants for a patent for public land, the decision of the officers of the land department on questions of fact will not be reviewed by the courts; as, *e. g.*, on the question of whether a claimant had resided on the land for the requisite time, and otherwise had conformed to the requirements of the law. *Vance v. Burbank*, 101 U. S. 514.

68. A survey under a grant of land in California which has received judicial sanction under the act of June 14, 1860 (12 Sts. 33), is conclusive as against adverse claimants under floating grants. *Henshaw v. Bissell*, 18 Wal. 255.

69. The act in terms applies to surveys ordered into court, and in relation to which proceedings were pending, as well as to surveys made subsequent to the passage of the act. *Ib.*

70. Nor does it matter that a different survey had been approved previously by the surveyor-general of California. The whole subject of surveys is under the control of congress before the issue of the patent. *Ib.*

# LANDS OF UNITED STATES — DISPOSAL —

*Power of Congress to dispose of Public Lands — The President — The Solicitor of the Treasury.*

See pl. 1-4.

*Reservation — What Subject.*

See pl. 5-17.

*Surrey — How made — What binds.*

See pl. 18-24.

*Sale — What Subject — Who may purchase — How made — Contracts respecting.*

See pl. 25-32.

*Passage of Title — How determined.*

See pl. 33, 34.

1. — *Power of Congress to dispose of Public Lands — The President — The Solicitor of the Treasury.*] Congress has the sole power to declare the effect and precedence of titles to public lands emanating from the United States. *Bagnell v. Broderick*, 13 Pet. 436.

2. The power of congress to "dispose of" the public lands is not limited to sales, but extends to leases thereof. *United States v. Gratiot*, 14 Pet. 526.

3. Congress has no power to organize a board of revision to annul titles confirmed many years before by the authorized agents of the government. *Reichart v. Felps*, 6 Wal. 160.

4. Under the act of March 3, 1807 (2 Sts. 448), the president had power to grant a license for a year to smelt lead at the mines in Illinois, reserving rent in kind and stipulating for certain privileges in connection therewith. *United States v. Gratiot*, 14 Pet. 526.

5. — *Reservation — What Subject.*] The president has power to reserve parcels of the public land from sale and to set them apart for public use; and he may modify, by reducing or enlarging it, a reservation previously made. *Grisar v. McDowell*, 6 Wal. 363.

6. That he has made such a modification by way of comprising an opposing private claim does not invalidate the reservation. *Ib.*

7. The act of May 29, 1830 (4 Sts. 414), empowers the solicitor of the treasury to sell and dispose of lands acquired by the United States in payment of debts; the act of March 3, 1863 (12 Sts. 740), empowers him to sell such lands "with the approval of the secretary of the treasury." One, therefore, who has bought such lands cannot be required to accept a deed until the secretary of the treasury has signified in writing his approval of the transaction; nor can such approval be presumed. *United States v. Jonas*, 19 Wal. 598.

8. No reservation or appropriation of land can be made, after a citizen has acquired a right to it under a pre-emption law. *United States v. Fitzgerald*, 15 Pet. 407.

9. The provision of the act of March 3, 1811, § 10 (2 Sts. 665), reserving from sale tracts of land the claim to which has been presented to

LANDS OF UNITED STATES — DISPOSAL —  
continued.

the recorder, does not apply to an unsurveyed claim the boundaries of which are not ascertainable from the calls of the concession. *Menard v. Massey*, 8 How. 293.

10. But a private survey may suffice to bring the claim within the scope of that provision. *Bissell v. Penrose*, 8 How. 317.

11. The act of 1811, reserving from sale lands which had been claimed before a board of commissioners, has no application to a case of conflicting confirmations of Spanish grants. *Willot v. Sandford*, 19 How. 79.

12. A reservation of specific land to the use of an Indian tribe, by treaty, confirms the original Indian title; and that title so confirmed will prevail over any other right derived from the government. *Gaines v. Nicholson*, 9 How. 356.

13. Between May 26, 1829, and July 9, 1832, there was no reservation from sale of lands in Missouri claimed under imperfect French and Spanish titles, and during that time they were liable to be appropriated to the use of the state under the act of March 6, 1820 (3 Sts. 545), and a title acquired by such appropriation and sold under the act of March 3, 1831 (4 Sts. 492), is valid as against a Spanish title subsequently confirmed by congress. *Delauriere v. Emison*, 15 How. 535.

14. There is nothing in the act of July 22, 1854 (10 Sts. 308), "to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein," etc., which indicates an intention on the part of the government to depart from its uniform policy of reserving from sale salt springs on the public lands. The language of section 4, which declares that "none of the provisions" of the act "shall extend to mineral or school lands, salines," etc., cannot be restricted in its operation to New Mexico, to which territory the first three sections of the act relate, but applies to Nebraska as well. *Morton v. Nebraska*, 21 Wal. 660.

15. The Nebraska enabling act of April 10, 1864, affords further evidence that, by the act of 1854, it was intended to reserve salines. Nor does the proviso to the section granting the salt springs to the state, "that no salt spring or lands, the right whereof is now vested in any individual," etc., "shall by this act be granted to said state," affect the case. *Id.*

16. Nor can the failure to transmit to the register's general plats notes of salines entered on the surveyor's field-books at the time of the survey of the Nebraska country affect the case, the words of the statute being general, and reserving from sale and location all salines, whether marked on the plats or not. *Id.*

17. While, possibly, from the language of the pre-emption act of September 4, 1841 (5 Sts. 456), reserving from entry lands on which are

LANDS OF UNITED STATES — DISPOSAL —  
continued.

situated "any known salines," a question might be made as to salines discovered only after entry, there can be no question where the salines were noted on the field-books and were palpable to the eye, and where it is apparent that the locators knew of their character, before entry. *Id.*

18. — *Survey — How made — What binds.* Under the act of April 24, 1820, § 1 (3 Sts. 566), and the instructions of the secretary of the treasury thereunder, it was the duty of the surveyor-general to divide fractional sections into as many half-quarter sections as practicable by north and south or east and west lines, so as to preserve the most compact forms; and where he made a different division it was held void, and that the register could not lawfully sell the land. [TANEY, C. J., and CATRON and DANIEL, JJ., dissenting.] *Brown v. Clements*, 3 How. 650.

19. The surveyor-general is not always absolutely bound to lay off a quarter or half-quarter section, wherever the fraction will admit of it; but if such a division would result in small and inconvenient parcels, he may leave the fraction entire, although it contain more than eighty acres. *Gazzam v. Phillips*, 20 How. 372.

20. It is the duty of the surveyor-general, under the act of March 3, 1851 (9 Sts. 632), to cause all private land claims finally confirmed thereunder to be surveyed, and the district court has power to compel its performance. *United States v. Fossatt*, 21 How. 445.

21. In general, a warrant for public land should be so located and surveyed that the surplus may be in one parcel; but the rule is not of universal obligation, and the surveyor, who in these matters has a large discretion, properly disregarded it here. *United States v. Vallejo*, 1 Wal. 658.

22. The meander lines run in surveying fractional sections bordering on navigable rivers are not run as boundaries of the tract, but merely to ascertain the quantity to be paid for by the purchaser. Thus, a grant of land on such a river was held to include a parcel of two and seventy-eight one hundredths acres lying between that line and the channel, lower than the main body and separated from it in very low water by a slough twenty-eight feet wide, but in high water entirely submerged, the whole having been laid out as part of a city and the slough filled up. *St. Paul & Pacific Railroad Co. v. Schurmeir*, 7 Wal. 272.

23. What surveys bind the United States and the parties who claim under them. *Jourdan v. Barrett*, 4 How. 169; *Mackay v. Dillon*, Id. 421; *Les Bois v. Bramell*, Id. 449.

24. A survey of a Spanish concession, made by a surveyor, and approved by the surveyor-general under the act of April 29, 1816 (3 Sts. 325), is binding on the United States and on the grantee, but not on third persons. *Menard v. Massey*, 8 How. 293.

**LANDS OF UNITED STATES — DISPOSAL —**  
*continued.*

**25.** — *Sale — What Subject — Who may purchase — How made — Contracts respecting.* Land within the Zanesville land-district, created by the act of March 3, 1803, § 6 (2 Sts. 237), could not be sold at the Marietta land office, after the passage of that act. *Matthews v. Zane*, 5 Cranch, 92; *Matthews v. Zane*, 7 Wheat. 164.

**26.** Where, after public lands within six miles of a projected railroad had been offered at public sale at two dollars and a half an acre, the location of the railroad was changed so as to leave the lands outside the six-mile limit, and congress then fixed their price at one dollar and a quarter, it was held, under the act of April 24, 1820 (3 Sts. 566), by which private entries are not permitted until after the lands have been exposed at public auction at the price for which they are afterwards sold, that notwithstanding they had been so offered at public sale, they must be offered at public sale at one dollar and a quarter an acre before being open to private entry. *Eldred v. Sexton*, 19 Wal. 189.

**27.** The acts admitting Illinois and Iowa into the Union, providing that five per cent of the net proceeds of the public lands within those states afterwards sold by congress should be appropriated to state uses, do not entitle the states to a percentage on the value of lands disposed of by government in satisfaction of military land-warrants. Such lands are not sold within the meaning of the acts, which contemplates sales in the ordinary sense from which money is received. [*MILLER and FIELD, JJ.*, dissenting.] *Iowa v. McFarland* [*Five per Cent Cases*], 110 U. S. 471.

**28.** The act of March 3, 1877 (19 Sts. 377), relative to the Arkansas Hot Springs reservation, providing, *inter alia*, for the purchase of portions thereof by claimants and occupants, was intended to extend to those only who had made improvements or claimed possession under an assertion of title or a right of pre-emption, and not, as against them, to those holding under them by lease and bound to surrender on the expiration of their terms. *Rector v. Gibbon*, 111 U. S. 276.

**29.** It is not a fraud on the United States for two land companies to procure a common agent to purchase for their joint and several account at a public sale of public lands. *Oliver v. Piatt*, 3 How. 333.

**30.** An agreement between the holder of an unfounded pre-emption claim and several of his creditors, that they will not bid against each other at a public sale of the land by the government, but will buy for the benefit of the debtor and such creditors as may come into the arrangement, is not available to creditors who do not come in as a ground for avoiding the sale. The government alone can interpose. *Easley v. Kellom*, 14 Wal. 279.

**31.** Neither § 4 nor § 5, act of March 31,

**LANDS OF UNITED STATES — DISPOSAL —**  
*continued.*

1830 (4 Sts. 492), can be set up by a purchaser of public land to defraud one from whom he merely received money to pay a bid, and to whom he fairly agreed to convey a part of the land purchased. The former section was intended to protect the government from secret and fraudulent combinations of bidders, the latter to protect *bona fide* bidders. *Fackler v. Ford*, 24 How. 322.

**32.** Nor can such a purchaser set up his own fraud in obtaining the title, in bar of a decree for a specific performance of his covenant to convey. *Id.*

**33.** — *Passage of Title — How determined.* Whether the title to public land has passed from the United States is a question to be determined exclusively by federal laws; but when it has passed, the property is subject to the state laws. *Wilcox v. Jackson*, 13 Pet. 498.

**34.** Whenever a tract has been appropriated to the public use, it is severed from the mass of the public domain, and subsequent laws of sale are not construed to embrace it, although they do not in terms except it. *Id.*

*Bounty Warrants — Location, etc.*

See LANDS OF UNITED STATES — BOUNTY WARRANTS.

*Congress alone has Power to appropriate.*

See CONGRESS, 11.

*Congress — Power to impose Conditions, etc.*

See LANDS OF UNITED STATES — CONFLICTING CLAIMS, 22.

*Entry of Land in Trust — Trust not enforced.*

See TRUST — LEGAL PROCEEDINGS, 2.

*Grant by Congress — In general.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS.

*Lands cease to be Public and Subject to State Taxation — When.*

See TAX — POWER, 53 *et seq.*

*Patent — In general.*

See LANDS OF UNITED STATES — PATENT.

*Powers, Duties, etc., of Officers — Surveys — Issue and Recall of Patents, etc.*

See LANDS OF UNITED STATES — LAND OFFICE.

*Reservation directed by Head of Executive Department presumed to be directed by President.*

See EXECUTIVE DEPARTMENTS, 3, 4.

*Reservation — Lands reserved to Indian Tribe.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS.

*Survey — Effect on Right to Pre-emption.*

See LANDS OF UNITED STATES — PRE-EMPTION, 25.

*Surveys — Copies as Evidence.*

See EVIDENCE — PRIMARY AND SECONDARY, 33.

**LANDS OF UNITED STATES — DISPOSAL — continued.**

*Surveys, etc. — Virginia Military Reservation.*

See **LANDS OF UNITED STATES — BOUNTY WARRANTS.**

*Title acquired by Register's Certificate, equitable and not Subject to Levy.*

See **EXECUTION**, 13.

**LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS — Effect of**

*Treaties of Cession, in general — Grants protected — Grants in what Territory, of what Lands, and to what Persons — How and when made, and here of Delivery of Possession, of Maps, Records, Surveys, etc. — Made by what Officers — How shown and how construed.*

See pl. 1-210.

*Abandonment and Forfeiture of such Titles, and here of Conditions.*

See pl. 211-241.

*Direct Legislative Confirmation of Inchoate Titles derived from such Governments.*

See pl. 242-264.

*Confirmation through Commissioners, etc. — In general, and here of Acts providing therefor and of Proceedings by Commissioners and Courts, Jurisdiction, Parties, Subject-matter, Practice, Limitation.*

See pl. 265-395.

1. — *Effect of Treaties of Cession, in general.*] Article 8 of the treaty of February 22, 1819 (8 Sts. 252), between the United States and Spain, ceding the Floridas to the United States, did not, *proprio vigore*, confirm Spanish grants of land in the territory thereby ceded. It was reserved for congress to carry out its provisions. *Foster v. Neilson*, 2 Pet. 253. But see *United States v. Arredondo*, 6 Pet. 691; *United States v. Percheman*, 7 Pet. 51; *Garcia v. Lee*, 12 Pet. 511; *Keene v. Whittaker*, 14 Pet. 170.

2. Under that article the title of lands granted by the king of Spain before January 24, 1818, was confirmed by force of the instrument itself. *United States v. Percheman*, 7 Pet. 51; *Michel v. United States*, 9 Pet. 711. And see *Garcia v. Lee*, 12 Pet. 511.

3. By that article Florida land completely granted by the king of Spain before January 24, 1818, was excepted from the grant made to the United States. *United States v. Arredondo*, 6 Pet. 691; *United States v. Percheman*, 7 Pet. 51.

4. The words "in possession of the lands," in that article, did not intend actual occupancy on the part of such prior grantees; they are satisfied by that constructive possession which is attributed by the law to legal ownership. *United States v. Arredondo*, 6 Pet. 691.

5. The stipulation in that article, although it avoided grants made after January 24, 1818,

**LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS — continued.**

did not avoid surveys made after, to locate grants made before, that time, if made before the change of sovereignty; and it made no difference that the grants did not describe the place where they were to be located. *United States v. Acosta*, 1 How. 24.

6. That treaty expressly recognizes conditional concessions of land by the Spanish authorities in East Florida, and allows time for the performance of conditions. *United States v. Clarke*, 9 Pet. 168.

7. An inchoate right to land was a right of property protected by that treaty. *Michel v. United States*, 9 Pet. 711.

8. Spanish grants of land between the Perdido and the Mississippi were not confirmed by that treaty, as the treaty did not cede any land west of the former river. *Pollard v. Files*, 2 How. 591; *United States v. Lynde*, 11 Wal. 632.

9. An inchoate right to land was a right of property protected by the French treaty of April 30, 1803 (8 Sts. 200), for the cession of Louisiana. *Delassus v. United States*, 9 Pet. 117; *Chouteau v. United States*, Id. 137; *Soulard v. United States*, 10 Pet. 100; *Strother v. Lucas*, 12 Pet. 410.

10. Incomplete Spanish titles to land in Louisiana were not made complete by the treaty of cession. The powers and duties of the crown of Spain relative thereto were thereby devolved upon the federal government. *Chouteau v. Eckhart*, 2 How. 344.

11. The stipulation in the treaty of St. Ildefonso, made between France and Spain in 1801 for the protection of the inhabitants of the ceded territory in the enjoyment of their property, had no application to grants of land made by the Spanish authorities after Spain had ceased to have power to make such grants. *United States v. Reynes*, 9 How. 127.

12. The declaration by Mexico through the commissioners who negotiated the treaty of Guadalupe Hidalgo, ceding California to the United States, that no grants of land were made by the Mexican governors of that province after May 13, 1846, cannot affect rights under grants in fact made after that date, and before the termination of the authority of those governors in such behalf. *United States v. Yorba*, 1 Wal. 412.

13. The property of towns held under the Mexican government was protected by the treaty of Guadalupe Hidalgo, not less than that of individuals. *Townsend v. Greeley*, 5 Wal. 326.

14. The treaty of November 3, 1804 (7 Sts. 84), between the United States and the Sacs and Foxes, held to protect the title of a settler under a Spanish permit, who at the date of the treaty had had open and notorious possession so long as to raise a presumption that the Indians then had notice of his claim. *Marsh v. Brooks*, 14 How. 513.

**LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS — continued.**

15. A stipulation in an Indian treaty for the cession of land to the United States, that the right of certain grantees of the tribe to certain portions of the land ceded shall be confirmed to "them and their heirs and assigns forever," gives a perfect title in fee simple to the persons named. *United States v. Brooks*, 10 How. 442.

16. Where by a treaty with an Indian tribe the tribe ceded certain lands to the United States, reserving to individual members of the tribe several parcels thereof, to be selected by the president when surveyed, such persons immediately became tenants in common with the government of the title in fee, and might sell and convey their titles without waiting for a survey or a selection; and the patents therefor, when issued, inured to the purchasers. *Mann v. Wilson*, 23 How. 457. See *Crews v. Burcham*, 1 Black, 352.

17. — *Grants protected — Grants in what Territory, of what Lands.* A grant by the British governor of Florida, after the declaration of independence, of land within the territory lying between the Mississippi and the Chattahoochee rivers, and between the thirty-first degree of north latitude and a line drawn from the mouth of the Yazoo River due east to the Chattahoochee, held invalid as the foundation of title in the federal courts. *Harcourt v. Gaillard*, 12 Wheat. 523.

18. Spanish grants, made after the treaty of 1782 between the United States and Great Britain, of land within the territory east of the Mississippi, and north of a line drawn from that river, at the thirty-first degree of north latitude eastward to the middle of the Appalachicola, have no intrinsic validity, and the holders must depend for their titles exclusively on the laws of the United States. *Henderson v. Poindexter*, 12 Wheat. 530; *La Roche v. Jones*, 9 How. 155; *Robinson v. Minor*, 10 How. 627.

19. No Spanish grant of such lands made while the country was wrongfully occupied by Spain is valid, unless it was confirmed by the compact of April 24, 1802, between the United States and Georgia, or was laid before the board of commissioners constituted by the acts of March 3, 1803, and March 27, 1804 (2 Sts. 229, 303). *Henderson v. Poindexter*, 12 Wheat. 530.

20. The treaty of St. Ildefonso for the cession of Louisiana from Spain to France deprived Spain of the power to grant land in that territory, if not after its date, certainly after March 21, 1801. *United States v. Reynes*, 9 How. 127.

21. A Spanish grant of land lying between the Mississippi and the Perdido, made after Spain parted with her title by that treaty, is invalid. *Ib.*; *United States v. Lynde*, 11 Wal. 632.

22. A French grant of land south of the thirty-first degree of north latitude, and between the Mississippi and the Perdido, made after Febru-

**LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS — continued.**

ary 10, 1763, the date of the treaty between France, Spain, and Great Britain, by which that territory was ceded to the latter power, is invalid. *Montault v. United States*, 12 How. 47.

23. A Spanish grant of land north of the thirty-first degree of north latitude, confirmed under the act of March 3, 1803 (2 Sts. 229), is valid as against any other claimant under a Spanish title, whether at law or in equity. *Robinson v. Minor*, 10 How. 627.

24. Spanish grants made in Texas for lands in the "Neutral ground" east of the Sabine River, from 1790 to 1800, are valid. *United States v. Perot*, 98 U. S. 428.

25. The act of March 26, 1804 (2 Sts. 287), annulling Spanish grants of land between the Mississippi and the Perdido, is valid. *Garcia v. Lee*, 12 Pet. 511; *Keene v. Whitaker*, 14 Pet. 170.

26. A Spanish grant of land in Florida in possession of the Indians, made prior to the treaty of February 22, 1819 (8 Sts. 252), held to pass the title of the crown, and to make a title valid under the treaty against the United States, and subject only to the Indian right of occupancy. *United States v. Fernandez*, 10 Pet. 303.

27. The Mexican colonization law of 1824, and the regulations of 1828 pursuant thereto, were inapplicable to grants of mines, and no grant of mining lands known to contain mines could be made thereunder. *United States v. Castillero*, 2 Black, 17.

28. The supreme government of Mexico preserved and continued in itself the supervision and control of mines which had belonged to the government of Spain, and also its special tribunal for dealing with matters pertaining thereto, and withheld all jurisdiction over them from the local authorities. [WAYNE, CATRON, and GRIER, JJ., dissenting.] *Ib.*

29. The laws of Spain concerning the discovery, denouncement, survey, and delivery of possession of a mine, and requiring a grant of one to be approved and recorded, were in force in Mexico, and compliance therewith was necessary to make a title to a mine in California. *Ib.*

30. The non-existence in the department of California of the tribunal to which, under those laws, the jurisdiction of mines belonged, did not dispense with a compliance with those laws, nor give validity to titles wanting such compliance. [WAYNE, CATRON, and GRIER, JJ., dissenting.] *Ib.*

31. Under those laws, it was not the discovery or denouncement, but the adjudication, admeasurement, and registration of proceedings, which gave a vested right in a mine. *Ib.*

32. The mission lands in California, after their secularization in 1833 and 1834, were subject to grant by the Mexican authorities, like other public lands. *United States v. Ritchie*, 17 How. 525; *United States v. Cervantes*, 18 How. 553.

**LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS — continued.**

33. The church had no title to the mission lands in California, but only an usufruct therein. Thus, such lands, when abandoned, might be granted as other lands. *United States v. Cervantes*, 18 How. 553.

34. The titles to village lots and commons in upper Louisiana, described. *Chouteau v. Eckhart*, 2 How. 344.

35. — *Grants protected — To what persons.* The "general title of Sutter" to land in California held invalid. *United States v. Nye*, 21 How. 408; *United States v. Bassett*, 21 How. 412; *United States v. Bennitz*, 23 How. 255; *United States v. Rose*, 23 How. 262; *United States v. Murphy*, 23 How. 476; *United States v. Chana*, 24 How. 131; *United States v. Hensley*, 1 Black, 35.

36. The Spanish grant to Arredondo of land in Alachua, Florida, gave a valid title, under the Spanish treaty of 1819, the laws of nations, of the United States, and of Spain. *United States v. Arredondo*, 6 Pet. 691.

37. The contracts of 1795 and 1797 between the Spanish government and the Marquis de Maison Rouge did not amount to a grant. [McLEAN, WAYNE, McKINLEY, and GRIER, JJ., dissenting.] *United States v. King*, 7 How. 833; *United States v. Turner*, 11 How. 663; *United States v. Coze*, 17 How. 41.

38. The decree of the Spanish governor of Louisiana herein appropriating certain lands for the use of a colony, held not to vest any title thereto in the Baron de Bastrop, but only to set it apart to be granted in future to the colonists when settled thereon. [McLEAN, WAYNE, McKINLEY, and GRIER, JJ., dissenting.] *United States v. Philadelphia*, 11 How. 609.

39. The title of Dubuque, under a grant from the Fox Indians, confirmed by the Spanish governor of Louisiana, was merely a permit to work mines and to occupy the land necessary for that purpose. *Chouteau v. Molony*, 16 How. 203.

40. The grant of land in Florida by the king of Spain to the duke of Alagon, whether dating from the royal order of December 17, 1817, or the grant of February 6, 1818, was annulled by the treaty of February 22, 1819. *Clark v. Braden*, 16 How. 635.

41. A pueblo or town, once formed and officially recognized, became entitled to the use of certain lands, and they were, upon petition, set apart and assigned to it; no evidence of title other than such assignment was required or given. *United States v. Pico*, 5 Wal. 536.

42. The disposition of the lands so assigned was subject to the control of the government. *Ib.*

43. By the law prevailing in California at the time of the conquest, the right of a pueblo to lands constituting its site and lands adjacent thereto was but an imperfect one until the lands were definitely assigned; and the right to the use

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and the disposition of them afterwards was subject to the control of the government. *Grisar v. McDowell*, 6 Wal. 363.

44. Thus, the right of a pueblo to such lands, where the lands had not been assigned, required recognition by the United States in order to become an indefeasible estate; and until they were set off and measured by its authority the government could set apart any part thereof for public use. *Ib.*

45. The necessity for such recognition is not affected by the presumption of a grant to a town in existence on July 7, 1846, raised by section 14 of the act of March 3, 1851 (9 Sts. 634), to settle private land claims in California, which excepts lots granted by a town from the provisions of that act. *Ib.*

46. Pueblos and towns held the lands constituting their site, together with certain lands adjacent, not absolutely, but in trust for their inhabitants; and municipal bodies in California, *e. g.* San Francisco, which succeeded to the possession of such lands on the conquest of that country, continued to hold in trust in the same manner. *Townsend v. Greeley*, 5 Wal. 326.

47. By the laws of Mexico, an Indian was capable of receiving a grant of land, and holding it with the same rights as a white person. *United States v. Ritchie*, 17 How. 525.

48. Whether alienage of the grantee would defeat the grant, *quære*. *Dalton v. United States*, 22 How. 436.

49. — *How and when made, and here of Delivery of Possession, of Maps, Records, Surveys, etc.* The different forms of Mexican grants of land in California, stated. *Higuera v. United States*, 5 Wal. 827; *Hornsby v. United States*, 10 Wal. 224.

50. Mexican concessions not confirmed. *United States v. Sutter*, 21 How. 170; *United States v. Nye*, *Id.* 408; *United States v. Bassett*, *Id.* 412.

51. Mexican concessions confirmed on the evidence. *Rodriguez v. United States*, 1 Wal. 582.

52. By what the courts are governed in determining upon the validity of Spanish or Mexican grants of land in California. *United States v. Auguisola*, 1 Wal. 352.

53. The Mexican law of 1824, providing for the disposition of the public lands and the regulations of 1828 pursuant thereto, being inconsistent with the Spanish laws, operated a repeal thereof; and as they were the only Mexican laws on that subject, and as they did not contemplate the sale of such lands for a pecuniary consideration, a Mexican governor of California had no power to make such a sale. [WAYNE and GRIER, JJ., dissenting.] *United States v. Vallejo*, 1 Black, 541.

54. Under the Mexican law of 1824 concerning grants of land, not more than one league of irrigable land, four of farming land not irrigable,

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and six for pasturage, could be united in one hand. *United States v. Hartnell*, 22 How. 286.

55. Thus, it was proper for the departmental assembly to reduce a grant of five leagues in one body and eleven in another to the same person, to a grant of eleven leagues in all. *Ib.*

56. And the action of the assembly therein was conclusive, as by the laws of Mexico the assembly had a right to confirm, reject, or modify the concessions of the governor. *Ib.*

57. In considering the effect of quantity on the validity of Mexican grants of land in California, the small value then attached to land there, and its almost exclusive use for grazing purposes, are to be noticed. *United States v. Suherland*, 19 How. 363.

58. And those facts, together with the want of surveying instruments, are to be considered as bearing on the question of the effect of the lack of precision in the description of boundaries. *Ib.*

59. The laws of Mexico prohibiting grants within ten leagues of the sea-coast had no application to grants to Mexican citizens, families, or single persons, but only to grants to empresarios who agreed to introduce and settle foreigners as colonists. *Arguello v. United States*, 18 How. 539.

60. Under the colonization laws of Mexico, the consent of the federal executive was essential to the validity of a grant of lands within the border and coast leagues; and permission from that government to colonize within those limits in Texas did not dispense with the necessity of procuring that consent to grants therein by the Mexican governor of that state. *League v. Egery*, 24 How. 264; *Foote v. Egery*, *Id.* 267.

61. The approval of the departmental assembly, although necessary to a perfect Mexican grant, was not essential to a confirmation under the act of March 3, 1851 (9 Sts. 631), as the grant passed an immediate interest, which the mere failure of the governor to submit the case to the assembly, and afterwards, if rejected, to the supreme government of the republic, pursuant to his duty, could not take away. [DANIEL, J., dissenting.] *United States v. Reading*, 18 How. 1; *United States v. Cervantes*, *Id.* 553; *United States v. Larkin*, *Id.* 557. See *Beard v. Federy*, 3 Wal. 478.

62. Where it appeared that a claim was submitted to the departmental assembly, and a committee reported in favor of the grant, but there was nothing to show final action thereon, it was held that the claimant should have the benefit of a presumption of a decision in his favor. *United States v. Cervantes*, 18 How. 553.

63. The validity of a Mexican grant of land in California is not necessarily affected by want of the approval of the departmental assembly. *United States v. Johnson*, 1 Wal. 326.

64. Under the Mexican law, a formal delivery of juridical possession, after execution of the grant,

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was necessary to the investment of title. *Graham v. United States*, 4 Wal. 259.

65. That proceeding, usually taken by the magistrate of the vicinage, with assisting witnesses, in the presence of the adjoining proprietors, involved, where there was any uncertainty in the description, a measurement and an establishment of boundaries. *Ib.*

66. A record thereof controls the location in a survey of a confirmed grant by the United States. *Ib.*

67. A claim to a Mexican grant of land in California was confirmed where the original grant appeared to be valid, although the claimant stood on a transfer from the original grantee of a date prior to that of the grant. *United States v. Vallejo*, 1 Black, 283.

68. Under the Spanish law formerly prevailing in Texas, a power of attorney to sell and convey land was properly executed by the attorney in his own name, the deed stating that it was executed for the principal. *Hanrick v. Barton*, 16 Wal. 166.

69. A bona fide purchaser of land in Texas claiming under a Mexican title is not bound to take notice of a prior Mexican title which is neither recorded in the proper county nor deposited in the land office. *Airhart v. Massieu*, 98 U. S. 491.

70. A Mexican grant of land in California by quantity in a designated place or within a larger tract described by boundaries passed the quantity specified, to be laid off by official authority at the place or within the tract designated. *Hornsbey v. United States*, 10 Wal. 224.

71. A grant of ten square leagues of land, within a certain district, in consideration of meritorious services, conferred an equitable right to such a quantity of land within that district, valid as against the Mexican government, and therefore as against the United States, although the particular tract had not been designated by a survey at the time of the cession to the United States. [CATRON and CAMPBELL, JJ., dissenting.] *Fremont v. United States*, 17 How. 542.

72. Where a Mexican grant of land in California designates the land by a particular name, and specifies the quantity, but gives no boundaries, the grantee is entitled to the quantity specified within the limits of his settlement and possession, if it can be obtained without encroaching on the prior rights of adjoining proprietors. *Alonso v. United States*, 8 Wal. 337.

73. A petition to the Mexican governor of California for a grant of the "remnant" of a particular tract, described by name and by the further words, "the extent of which is about five leagues more or less," was held to warrant a grant of the entire residue, without regard to the words indicating the number of leagues, those words being intended merely as an estimate of the surplus. *United States v. D'Aguirre*, 1 Wal. 311.



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74. Where a Mexican grant of land in California gave specific boundaries, stated that the grant was a league in length and three quarters of a league in breadth, a little more or less, and contained the usual reservation of surplus to the nation, it was confirmed for the quantity mentioned within the boundaries described. *Gonzales v. United States*, 22 How. 161.

75. Where a Mexican grant of land in California stated the quantity as "two square leagues, a little more or less," and described boundaries, but not very definitely, and there was a discrepancy between those items of description, the grant was confirmed for a tract two leagues square, within the boundaries described, a map which accompanied the grant, as explained by testimony, showing clearly that that was the quantity intended to be granted. *United States v. Pacheco*, 22 How. 225.

76. Where a petition for a Mexican grant of land in California was for two leagues according to a plan furnished, and the grant was for land "of the extent mentioned in the plan," the surplus to remain for the use of the nation, it was held that, as the claimant had only an equity, the petition and concession should be taken together, and that the claim could not be confirmed for more than the two leagues, although the boundaries in the plan included a much larger quantity. *Yontz v. United States*, 23 How. 495.

77. Where neither the petition nor the patent stated the quantity, resort was had to the concession, and then, sides and the quantity being given, the grant was held to be sufficiently definite. *United States v. Larkin*, 18 How. 557.

78. A grant by a Mexican governor, made in a time of intestine war, while the governor was in flight from the seat of government, shortly before his overthrow, and to one of his supporters, as a compensation for service or an inducement to loyalty, must be rejected, where its validity was never acknowledged by his successors or by this government. *United States v. Sutter*, 21 How. 170. See *United States v. Nye*, 21 How. 408; *United States v. Bassett*, 21 How. 412; *United States v. Bennett*, 23 How. 255; *United States v. Rose*, 23 How. 262.

79. Where the date in a concession of land in California, in fact made by a Mexican governor a few days before possession of the country was taken by the United States forces, was altered to an earlier date, and the genuineness of the signature was doubtful, and no possession had been taken, a decree confirming the claim was reversed, and the cause remanded for additional testimony and a further hearing. *United States v. Galbraith*, 22 How. 89.

80. A claim under a Mexican grant of land in California, supported only by a titulo produced from the private custody of the claimant, and bearing date only thirteen days before the occupation of Monterey, and when the country north of it was

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already occupied by the American forces, and unaccompanied by satisfactory evidence of occupation or of any assertion of claim for seven years thereafter, was held invalid, and the decree in the claimant's favor reversed. *United States v. Pico*, 23 How. 321.

81. Where a Mexican grant of land in California purporting to be dated in 1846 was not presented for record until 1849, and there was no possession prior to that time, and no evidence of the date when the paper was signed but the paper itself, and no petition, and no information thereon, the grant was not confirmed. *United States v. Castro*, 24 How. 346.

82. One who, under art. 24, Mexican laws of 1825, procured from the government, by purchase, a grant of public land, could alienate it before its selection; his formal act of sale, with a power to his alienee to obtain the title, constituted the latter the owner. Where, therefore, the grant contained no specific description of the land, but contemplated its selection and location, the title of extension, when given to the alienee, was complete. *Hunnicutt v. Peyton*, 102 U. S. 333.

83. The ordinance of San Francisco known as the Van Ness ordinance gave the holders of alcalde grants of land within certain limits a new title on which an action would lie, if the grants without it were ineffectual to pass title, where the grants had been recorded in the proper books, deposited with the recorder of the county on or before April 3, 1850. *Merryman v. Bourne*, 9 Wal. 592.

84. An order from the governor of California in 1844 authorizing a claimant to search for land and to settle thereon with a view to a future grant, followed in 1846 by a petition for the land selected, a reference to the alcalde for information, and a report by that officer that the land was not private property, was held to confer no vested right, although the claimant had taken possession and made improvements. *United States v. Garcia*, 22 How. 274.

85. Where the claimant of land in Mexico showed a petition, an order of the governor permitting him to occupy while proceedings were in progress to perfect his title, a report that the land was subject to grant, and continued occupation for fourteen years, with cultivation and improvement, the supreme court refused to reverse a decree in his favor. *United States v. Alviso*, 23 How. 318.

86. In general, where boundaries are given, and a limitation upon the quantity embraced therein is intended, words expressing that intention are used; and in their absence the extent of the grant is subject only to the limitation on the power of the governor imposed by the colonization law of 1824. *United States v. Pico*, 5 Wal. 536.

87. Under the laws and customs of Mexico, a complete *expediente* consists of a petition with a *diseño* annexed, a marginal decree approving the

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petition, an order of reference for information, a report thereon, the decree of concession, and a copy of the grant. *United States v. Knight*, 1 Black, 227.

88. If the map, with other description accompanying the *expediente*, will enable the surveyor to locate the grant, it is sufficient. *United States v. Sutherland*, 19 How. 363.

89. Although the regulations of 1828 provided that a map of the land should accompany the petition for a grant, it was not exacted in all cases, but might be dispensed with in special circumstances at the discretion of the governor. [CLIFFORD, SWAYNE, and DAVIS, JJ., dissenting.] *Hornshy v. United States*, 10 Wal. 224.

90. Measurement and segregation from the public domain of land so granted could be made only by the officers of the government. Measurement by the grantee was inoperative for any purpose; nor did possession before measurement, although permitted, confer an absolute right to the land occupied, or control the action of the officers in making the segregation. *Ib.*

91. If, after delivery of a grant, it be altered by direction of the grantor, in the specification of the quantity of land granted, and then redelivered, the redelivery will be in effect a re-execution. *Malarin v. United States*, 1 Wal. 282.

92. A grant of pueblo land in San Francisco, in the form, "I, the undersigned alcalde, do hereby give, grant, and convey unto A., his heirs and assigns forever," etc., was held sufficient to pass title, although not meeting all the requirements of the "plan of Pitic;" and such is the tenor of the California decisions. Such a grant may be made to an infant. *Palmer v. Low*, 98 U. S. 1.

93. The effect of an alcalde grant of pueblo lands in San Francisco, made before the incorporation of the city but after the conquest, does not depend on federal legislation, but on the effect of the conquest on the powers of local government under the Mexican laws. *San Francisco v. Scott*, 111 U. S. 768.

94. Where two orders or decrees dated on successive days were produced in support of a Mexican grant, and the first announced the approval of the claim, and the second purported to be a regular concession of title, and was more definite in the matter of boundaries, the second was held to govern the description. *Arguello v. United States*, 18 How. 539; *United States v. Cervantes*, Id. 553.

95. The form of a complete Spanish title. *Menard v. Massey*, 8 How. 293; *Fremont v. United States*, 17 How. 542.

96. The laws of Spain as to the disposition of the royal domain in Louisiana. *Strother v. Lucas*, 12 Pet. 410; *United States v. Delespine*, 15 Pet. 319; *Les Bois v. Bramell*, 4 How. 449; *Lecompte v. United States*, 11 How. 115.

97. Concessions of land by Spanish governors

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of East Florida confirmed. *United States v. Huertas*, 8 Pet. 475; *United States v. Gomez*, Id. 477; *United States v. Fleming*, Id. 478; *United States v. Levi*, Id. 479; *United States v. Young*, Id. 484; *United States v. Hernandez*, Id. 485; *United States v. Huertas*, Id. 488; *United States v. Fernandez*, 10 Pet. 303; *United States v. Segui*, 10 Pet. 306; *United States v. Chaires*, 10 Pet. 308; *United States v. Seton*, 10 Pet. 309; *United States v. Sibbald*, 10 Pet. 313; *United States v. Levy*, 13 Pet. 81; *United States v. Arredondo*, 13 Pet. 88; *United States v. Waterman*, 14 Pet. 478; *United States v. Rodman*, 15 Pet. 130; *United States v. Delespine*, 15 Pet. 226.

98. Concessions by the British governor of Florida, and confirmed by the Spanish authorities, confirmed. *United States v. Fatio*, 8 Pet. 492; *United States v. Gibson*, Id. 494.

99. A concession by the lieutenant-governor of Upper Louisiana, particularly describing the tract and ordering a survey, held valid. *Mackey v. United States*, 10 Pet. 340.

100. Review of the history of the Spanish power in Florida. *United States v. Power*, 11 How. 570.

101. The Spanish title to lands lying near forts in Florida, examined. *Michel v. United States*, 15 Pet. 52.

102. The Spanish authorities had power to make grants of the public domain in Florida, in accordance with their own ideas of the merits of the grantees; and the federal courts can consider only whether a grant was made, and what was its legal effect. *United States v. Hanson*, 16 Pet. 196.

103. O'Reilly's eighth regulation, providing that no grant should exceed a square league, did not prohibit the making of several grants to one person amounting to more in the aggregate. *Chouteau v. United States*, 9 Pet. 147.

104. The regulations of O'Reilly were not in force in Upper Louisiana. *Mackey v. United States*, 10 Pet. 340.

105. An inquisition taken under the Spanish authorities before the treaty of February 22, 1819 (8 Sta. 252,) by which it was found that the Indians had abandoned the land previously granted by those authorities, held an adjudication. *United States v. Arredondo*, 6 Pet. 691.

106. A grant containing no calls by which it could be located, and not in fact located by the Spanish authorities, is void as against the United States. *Buyck v. United States*, 15 Pet. 215; *United States v. Delespine*, Id. 319; *United States v. King*, 3 How. 773; *Villalobos v. United States*, 10 How. 541; *Lecompte v. United States*, 11 How. 115; *De Vilemont v. United States*, 13 How. 261.

107. Where a concession of land by the governor of East Florida did not ascertain the particular land granted, so that it could be severed from the public domain by a survey pursuant to

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calls in the grant, and the only survey made for the grantee under the Spanish authorities was of land not granted, the grantee was held to have no title as against the United States. *United States v. Forbes*, 15 Pet. 173.

108. Where the concession did not ascertain the particular land granted, except as a part of a tract fifty or sixty miles long, or, in a certain event, a part of another tract a hundred miles long, the grant was held void for uncertainty. *O'Hara v. United States*, 15 Pet. 275.

109. A grant by the local Spanish authorities in East Florida, of "a square of eight leagues" of land "on the waters of Hillsborough and Tampa bays," not located by a survey recognized by those authorities before January 24, 1818, and not being capable of being surveyed by its calls, did not separate any particular tract from the public domain, and therefore made no title which could be protected by the treaty of 1819. *United States v. Miranda*, 16 Pet. 153.

110. A grant by the local Spanish authorities in East Florida of "ten thousand acres on the northwest side of the head or lagoon of Indian River," held, in the circumstances, sufficiently specific to support a survey made after the date of the treaty of 1819. *United States v. Low*, 16 Pet. 162.

111. A Spanish grant which contained no description or calls, except such as showed that the grantee was to have "six miles square" in a territory thirty miles by six, and which was aided by no legal survey, was held void. *United States v. Lawton*, 5 How. 10.

112. In 1783, the Spanish governor of Louisiana made a concession of land for a *vacherie*, but the calls of the grant were so vague that the land could not be identified without a survey, and no survey was made while the country was held by Spain, and the consideration for the grant, i. e. the removal of the grantee with his family and slaves, did not appear to have been executed. It was held that there was no title thereunder as against the United States. *United States v. Boisdoré*, 11 How. 63.

113. Where a petition for a Spanish concession was for a tract without definite boundaries, and was referred to the solicitor-general, with instructions to put the petitioner in possession, if not to the prejudice of third persons, some subsequent action of the government was necessary, in view of that condition, to make the grant absolute. *Lecompte v. United States*, 11 How. 115.

114. Under the act of May 26, 1824 (4 Sts. 52), a claim to land in Missouri under a Spanish concession cannot be confirmed, unless some particular tract were severed from the public domain by an authorized survey, or by such a description in the concession, warrant, or order of survey as may be surveyed pursuant to its calls. *Smith v. United States*, 10 Pet. 326; *Wherry v. United States*, Id. 338.

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115. Nor can a claim to land in Louisiana. *United States v. D'Auterive*, 15 How. 14.

116. Under the act of June 22, 1860 (12 Sts. 85), for the settlement of private land claims in Florida, Louisiana, etc., a claim to land in the latter state under a French concession cannot be confirmed where no particular tract was surveyed before the cession, and where the grant furnishes no means whereby its location or extent can be ascertained. *D'Auterive v. United States*, 101 U. S. 700.

117. A survey by the surveyor-general of Florida, made after January 24, 1818, at a place different from that called for by the grant, held inoperative. *United States v. Breward*, 16 Pet. 143.

118. But where the grant sufficiently described the land to enable the surveyor to run the lines, it was held valid, and a survey directed. *Id.*

119. Surveys not conforming in part to the grants, the claims as to such parts disallowed. *United States v. Levi*, 8 Pet. 479; *United States v. Huertas*, Id. 488; *United States v. Huertas*, 9 Pet. 171.

120. Under a concession by a governor of East Florida, held, that the survey must be made as called for in the concession, and that, if the whole quantity could not thus be had, because of prior grants to other persons, an equivalent elsewhere could not be taken, the concession giving no such equivalent. *United States v. Arredondo*, 13 Pet. 133.

121. The certificate of a survey by the surveyor-general of the Spanish province of Florida is to be taken as *prima facie* correct. *United States v. Breward*, 16 Pet. 143.

122. A grant by the Spanish governor of East Florida of a certain number of acres of land in that province, directing the surveyor-general to run the lands for the grantee "in the places he mentions," he having mentioned two in his petition, "or in others that are vacant, and of equal convenience to the party," held to authorize a survey in more than two places, and of any vacant lands in the province, to make out the quantity. *United States v. Clarke*, 16 Pet. 228.

123. A mere private survey, made to enable the city of St. Louis to present its claim to commons before the board of commissioners, under the act of March 2, 1805 (2 Sts. 324), had no influence on the title, and was not adopted by the act of confirmation of June 13, 1812 (2 Sts. 748). *Mackay v. Dillon*, 4 How. 421.

124. Although a grant declare that it was made in conformity with a royal order, yet if it also show other consideration, and that, in fact, it was not founded on that order, it will not be held invalid merely because the quantity of land granted is in excess of the permission of that order. *United States v. Rodman*, 15 Pet. 130.

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125. The authenticity of a document having been sanctioned by a Spanish tribunal in acting thereon in making a title, it was held too late to question its genuineness as respecting that title. *United States v. Delespine*, 15 Pet. 319.

126. Although a document purporting to be a return of a Spanish survey, recognized by the colonial authorities as genuine, is to be deemed so, *prima facie*, it may be shown to be forged and antedated. *United States v. King*, 3 How. 773.

127. The term *título* in the Spanish language means only the instrument which is evidence of the right, interest, or estate conferred, and is therefore applicable to papers which give a mere right of occupancy as well as to those which convey title in the ordinary acceptance of the term. *De Haro v. United States*, 5 Wal. 599.

128. The Spanish words meaning in English "a complete title," when used in a Spanish grant of land in Louisiana, refer only to the instruments which constitute evidence of title, not to the estate or interest thereby conveyed. *Slidell v. Grandjean*, 111 U. S. 412.

129. A title to land in Florida obtained from the Indian tribes, and confirmed by the local Spanish authorities before the cession to the United States, held valid. *Müchel v. United States*, 9 Pet. 711; *United States v. Fernandez*, 10 Pet. 303.

130. Where a claimant of land in California shows no grant from the Mexican authorities, and relies on nothing but possession, the possession, however long continued, will not avail, if permitted only on payment of rent to the authorities of the pueblo of the common lands of which the land in question was claimed to be a part. *United States v. Chaboya*, 2 Black, 593.

131. Long-continued and undisturbed possession of land in California, while that country belonged to Spain or Mexico, under simple permission to occupy from a priest of a mission to which the land originally belonged, or from a local military commander, gives no equity on which a claim is entitled to confirmation under the act of March 3, 1851 (9 Sts. 631), for the ascertainment and settlement of private land claims in California. *Serrano v. United States*, 5 Wal. 451.

132. A grant under the Mexican colonization laws of 1824 and 1828 is not necessarily defeated by the fact that no approval by the supreme government is shown. [DANIEL and CLIFFORD, JJ., dissenting.] *United States v. Sutter*, 21 How. 170.

133. A grant of land in Louisiana by the French authorities after November 3, 1762, the date of the cession of that province to Spain by the treaty of Fontainebleau, is void. *United States v. D'Auterive*, 10 How. 609; *United States v. Ducros*, 15 How. 38.

134. Although such grants conveyed no title,

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a continued possession thereunder may lay a foundation for a presumption of subsequent confirmation by the Spanish authorities. *United States v. Pillerin*, 13 How. 9.

135. A concession of land under authority of the governor-general of Louisiana confirmed. *Delassus v. United States*, 9 Pet. 117.

136. Where the documentary evidence produced by a claimant of an incomplete title to land in the territory ceded by France in 1803 contains no boundary lines sufficient to sever a definite parcel from the public domain, the concession creates no right of property which can be asserted in a court without an antecedent survey and location. *Maguire v. Tyler*, 8 Wal. 650.

137. A French grant of land in Louisiana, unaided by a survey, the calls of which are too vague to designate the particular tract, held not to support an ejectment. *Denise v. Ruggles*, 16 How. 242.

138. *Semble* that want of segregation of the land granted by an old French grant of land in Louisiana is cured by possession of a hundred and fifty years. *Trenier v. Stewart*, 101 U. S. 797.

139. A French settler on land in the north-western territory in 1783, when Virginia ceded the territory to the United States, had a title, his claim being to a specific tract, against which the statute of limitations might run in favor of an adverse occupant. *Langdeau v. Hanes*, 21 Wal. 521.

140. Although a Spanish grant of land in Louisiana may have been void, the interest acquired under a previous concession, followed by a survey ordered and recorded, and by possession, was an interest such as could be transferred by mortgage or reached by judicial process. *Bryan v. Kennett*, 113 U. S. 179.

141. And a subsequent release by the United States of whatever title it might have in the premises to the heirs, legal representatives, "or assignees" of the grantee, operates to perfect the title of those holding under valid judicial proceedings, not the title of the heirs of the grantee. *Ib.*

142. — *Made by what Officers.*] The power of Mexican territorial governors to grant land, considered. *United States v. Peralta*, 19 How. 343.

143. Under the Mexican laws relating to the disposition of public lands in the territories, the departmental assembly had by itself no power to grant, but merely power to confirm grants made by the governor. *United States v. Vigil*, 13 Wal. 449.

144. The submission of the grants to the departmental assembly for its approval was the duty of the governor, not of the grantee, and the governor's neglect would not divest the title. *Hornsby v. United States*, 10 Wal. 224.

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145. Under the regulations of 1828, a clause in the grant subjecting it to the approval of the departmental assembly did not prevent the title from passing on the execution of the instrument, the authority to make grants being lodged solely in the governor; but the title was defeasible until such approval was had. [CLIFFORD, SWAYNE, and DAVIS, JJ., dissenting.] *Ib.*

146. The governor, in proceeding, on receipt of a petition for land, to obtain the necessary information as to the qualifications of the petitioner and the character of the land, as required by those regulations, was not bound to make a formal reference to the local magistrate, but might make his own investigation or consult the appropriate municipal authority. *Ib.*

147. The governor and assembly had power to grant only for the purposes of settlement or cultivation; none, for instance, to grant a great quantity of land on condition that the grantee would construct wells for the relief of travellers and factories for the use of the state. *United States v. Vigil*, 13 Wal. 449.

148. The authority of Mexican officers to grant lands in California is to be deemed to have ended on July 7, 1846, the day on which the conquest of that province is by the government considered to have become complete. *United States v. Yorba*, 1 Wal. 412; *Stearns v. United States*, 6 Wal. 589; *Hornaby v. United States*, 10 Wal. 224.

149. The Mexican governor of California had no power to make a valid grant of the mission of San Gabriel on June 8, 1846. *United States v. Workman*, 1 Wal. 745.

150. Nor to make a grant of the mission of San Luis Rey on May 18, 1846. *United States v. Jones*, 1 Wal. 766.

151. The alcalde was the chief executive officer of the pueblo of San Francisco, and had authority to make grants of the pueblo lands, subject to the authority of the ayuntamiento, and the still higher authority of the governor and departmental assembly. *Merryman v. Bourne*, 9 Wal. 592.

152. If a claimant under a Mexican grant produce record evidence thereof, and the only question be as to the authority of the officer to make it, the presumption will be in favor of the authority. *United States v. Peralta*, 19 How. 343.

153. Where a claim to land in California was founded on a grant purporting to have been authorized by a special order or decree of the president of Mexico, and not under the Mexican colonization laws, it was held that the authority so delegated should have been strictly pursued, and that, as the power was a joint power to the governor and the departmental assembly, and the latter took no part in making the grant, the grant was void. *United States v. Osio*, 23 How. 273.

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154. Where an order of the central Mexican government to the governor of California authorized him to grant the lands of the islands adjacent to the department, in conjunction with the assembly, and a subsequent despatch of the same date required him to reserve such islands as a certain person might select, and grant them to him, it was held that a grant of an island to that person under that order did not require the confirmation of the assembly, and, being regular in all other respects, should be confirmed. *United States v. Castillero*, 23 How. 464.

155. After the conquest of California, prefects, however appointed or elected, and whatever the power of prefects in that regard under the Mexican government, had no power to grant the common or unappropriated lands of the pueblos within their jurisdiction. *Alexander v. Roulet*, 13 Wal. 386.

156. An account of the Spanish officers who had power to make grants. *United States v. Moore*, 12 How. 209.

157. The Spanish governor of East Florida, as the king's deputy, was the sole judge of the merits of an applicant, and of the sufficiency of the consideration of a grant. *United States v. Acosta*, 1 How. 24.

158. From 1774, he had power to grant lands without any special restriction as to quantity. *United States v. Clarke*, 8 Pet. 436.

159. The Spanish governor of Louisiana had no power to make a grant of lands in West Florida in August, 1781. *United States v. Power*, 11 How. 570.

160. A warrant or order of survey of land made by the Spanish authorities at Mobile, in 1806, did not confer a complete legal title. *De la Croix v. Chamberlain*, 12 Wheat. 599.

161. Under the act of May 23, 1828 (4 Sts. 284), the acts of public officers of Spain in making a grant of land in Florida were presumed to have been performed on proper authority, and to be valid, in the absence of fraud. *United States v. Arredondo*, 6 Pet. 691.

162. Although, on a grant by a royal Spanish officer of land in Florida, a presumption arose from the grant itself that the officer had authority to make it, the court examined the proceedings on an allegation of defect of authority on their face. *United States v. Percheman*, 7 Pet. 51.

163. The eighth article of the Spanish treaty of February 22, 1819 (8 Sts. 252), provided for grants made by a governor having a general authority to grant lands; and his act should be taken as not only *prima facie* valid, but as binding until disavowed by the crown, assuming that the crown had power to disavow it. *United States v. Clarke*, 8 Pet. 436.

164. The Spanish surveyor-general of Florida had no authority to change the location of a grant nor to split up the surveys, but was bound to make the surveys in reasonable conformity

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to the grants. *Villalobos v. United States*, 10 How. 541.

165. Grants by the military commander of the Spanish post at Nacogdoches, for the purpose of grazing, fitted and used therefor, conferred equitable titles. *United States v. Davenport*, 15 How. 1; *United States v. Patterson*, Id. 10.

166. A French grant of land in Louisiana was not confirmed by the Spanish governor by mere quasi judicial action on an inventory of the estate of the deceased grantee, in which the land was mentioned and described. *United States v. Ducros*, 15 How. 38.

167. From 1774 to 1798, although the power to grant lands in the province of Louisiana was vested in the military governor, the commandants of posts were employed to make the original concessions and orders of survey, and to put applicants into possession, and were the "proper authorities" to perform those acts, within the meaning of the act of May 26, 1824 (4 Sts. 52). *Delassus v. United States*, 9 Pet. 117.

168. O'Reilly's regulations were intended, not to control the power of the governor, but for the government of subordinate officers. *Id.*

169. A concession made by an officer authorized to make it is presumed to be conformable to his powers. *Id.* See *Strother v. Lucas*, 12 Pet. 410.

170. After the transfer of the power to grant lands in Louisiana from the military governor to the intendant-general, in 1798, the commandants of posts were sub-delegates *ex officio*, so that their power to make orders of survey and thus grant incipient rights capable of being perfected into complete titles was not affected by that transfer. *Chouteau v. United States*, 9 Pet. 137.

171. On petition under the act of May 26, 1824 (4 Sts. 52), for confirmation of title to land in Louisiana, alleged to have been acquired while that territory was under the Spanish government, it need not be proved that the applicant possessed property sufficient to entitle him to the land he solicited, that having been decided by the officer who granted the application. *Chouteau v. United States*, 9 Pet. 147.

172. — *How shown and how construed.* In general, to support a title to land in California under a Mexican grant, the written evidence in lawful form must be found in the public records and archives, as that is the best evidence. *United States v. Castro*, 24 How. 346; *United States v. Neleigh*, 1 Black, 298; *United States v. Vallejo*, 1 Black, 541; *Romero v. United States*, 1 Wal. 721; *Pico v. United States*, 2 Wal. 279; *Peralta v. United States*, 3 Wal. 434. See *United States v. Gomez*, 3 Wal. 752.

173. If that be wanting, there should be secondary evidence that a grant was regularly made and recorded, that the record was lost or destroyed, and that within a reasonable time there was judicial and actual possession. *United States*

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*v. Castro*, 24 How. 346; *United States v. Neleigh*, 1 Black, 298; *Peralta v. United States*, 3 Wal. 434.

174. The loss of the original Mexican grant need not be proved with absolute certainty, to let in secondary evidence of its existence. *United States v. Sutter*, 21 How. 170.

175. The absence of record evidence of the grant, and of evidence of the loss of the records in which it existed, was held fatal to a claim to a Mexican grant. *United States v. Knight*, 1 Black, 227.

176. Proof of the loss or destruction of some few documents on the removal of the archives by the American authorities on the occupation of the country will not be received as a substitute for record evidence, in the absence of proof that the document produced was recorded in some book shown to be lost. *United States v. Neleigh*, 1 Black, 298.

177. The circumstances herein were held to justify the production of a copy from the court's register, although without the signature of the governor. *United States v. Sutter*, 21 How. 170.

178. The testimony of Mexican governors and secretaries cannot be received to supply the want of proper public records in proof of grants. *United States v. Neleigh*, 1 Black, 298.

179. Where a doubt arises upon the meaning of a grant as to the quantity ceded, reference may be had to the juridical possession delivered to the grantee, such proceeding involving an ascertainment of boundaries and having the force of a judicial determination. *United States v. Pico*, 5 Wal. 536.

180. A claim to a grant of land in California, purporting to have been made by the Mexican governor of that province on May 2, 1846, rejected on the ground that the archive papers were insufficient and not helped by other papers not genuine, but gathered and presented as an afterthought. *Roland v. United States*, 7 Wal. 743.

181. Where a Mexican grant of land in California stood on the document of concession alone, unsupported by proof of the preliminary steps on the petition, or of delivery of possession, or of the approval of the departmental assembly, the judgment of the court below confirming the claim was reversed and the cause remanded for further evidence and examination, although there was some evidence of actual possession, and the concession was indorsed as recorded in the proper book, there being no proof of record, and the genuineness of the concession being doubtful. *United States v. Teschmaker*, 22 How. 392.

182. The same judgment was rendered where the document of concession was supported only by certain papers coming from the possession of the claimant which tended to prove an approval of the grant by the departmental assembly. *United States v. Pico*, 22 How. 406; *United States v. Vallejo*, Id. 416.

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**183.** A Mexican grant of land in California was confirmed, where the claimant had been in undisputed possession for sixteen years, although there was an apparent alteration in the date of the grant, the alteration being such as to prejudice the claimant, and hence not to be imputed to him, and the true date being proved. *United States v. De Haro*, 22 How. 293.

**184.** A claim to a Mexican grant of land in California was rejected, after confirmation by the commissioners and the district court, because of an alteration of date on the face of the grant, the absence of archive evidence of the grant, the want of approval by the departmental assembly, the production of a false or forged certificate of approval signed by the governor and his secretary, the want of possession and cultivation, and of the probability that the grant was fabricated by the governor and secretary after the overthrow of their power by the United States. *United States v. Galbraith*, 2 Black, 394.

**185.** Where parties petitioned a Mexican governor of California for a grant of land near a mission, and the petition was referred to the secretary of state, who reported that the land was unoccupied, but that, as common lands were to be assigned to the mission, the petitioners might meanwhile occupy under a provisional license, and the governor made a decree declaring them "empowered to occupy provisionally," and directed a proper document to be issued and registered, and a paper was accordingly issued granting "the occupation" subject to the measurement of common lands, with conditions against alienation, for occupation within a year, and for forfeiture for non-compliance, the decree was held to be a naked license, passing no title and so carrying nothing to the heirs of the licensees, and a claim resting on such a license not confirmable under the act of March 3, 1851. *De Haro v. United States*, 5 Wal. 599.

**186.** Where the personal representatives of one who had entered long before under a pueblo grant which might be invalid because the lands might turn out to be without the pueblo limits, petitioned a Mexican governor of a department of California for a grant of the lands, and he decreed that all places ceded for ranchos in that jurisdiction should remain as provisional grants until the common lands of the pueblo should be regulated, such representatives took title provisionally; i. e., if the tract fell within the pueblo limits when ascertained, the decree should be inoperative, but if without, the title thereunder should become absolute. *United States v. Rocha*, 9 Wal. 639.

**187.** Under the law of Mexico an instrument which, reciting a purchase of land from the original grantee, is in the words, "I grant and transfer all the right which I have in the land," operates to convey all of the estate of the grantor, and not as a mere license to occupy, although it

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declares that the grantee "shall make such use thereof as may be most convenient for him." *Steinbach v. Stewart*, 11 Wal. 566.

**188.** The record of an alcalde grant of pueblo land in San Francisco, kept in accordance with the requirements of Mexican law before the incorporation of the city, and in the city and county recorder's office, to which it was turned over pursuant to law, is competent evidence, in a federal court, of the grant recorded, being recognized as such by the decisions of the supreme court of California establishing the rule as a rule of property. *Palmer v. Low*, 98 U. S. 1.

**189.** The claim herein to a Mexican grant was held invalid on the evidence as founded on forged papers. *United States v. Knight*, 1 Black, 227.

**190.** Where a claim to a Mexican grant of land in California was unsupported by archive evidence, and the absence of such evidence was unaccounted for, and there was no such possession as to raise an equity, and the *expediente* produced was tainted with suspicion of fraud, the claim was rejected. *White v. United States*, 1 Wal. 660.

**191.** Where a claim under a Mexican grant of land in California stood solely on a paper in the possession of the claimant purporting to be a grant, unsupported by proof of the taking of any of the steps regularly preliminary to such a grant, or of possession, and the evidence of the genuineness of the governor's signature was doubtful, the decree of the court below rejecting the claim was affirmed. *Fuentes v. United States*, 22 How. 443.

**192.** A naked concession by a Mexican governor of California, unsupported by evidence of compliance with the Mexican regulations of 1828, requiring a petition and other preliminaries, was held insufficient to authorize a confirmation of the claim. *United States v. Cambuston*, 20 How. 59.

**193.** And it was held to be a circumstance of suspicion that the concession was signed by the governor in the last days of Mexican power in California, and while the civil affairs of the province were in great confusion. *Ib.*

**194.** But as fraud was not suggested below, the cause was remanded for further proof of the genuineness of the claim. *Ib.*

**195.** Where a Mexican grant of land in California was in all respects regular, and was followed by ten years' possession, it was presumed that the grantee was a citizen and entitled to hold land; and the presumption was considered as not overcome by evidence of a few loose expressions by the grantee looking the other way. *Dalton v. United States*, 22 How. 436.

**196.** Where a claim under a Mexican grant of land in California was unsupported by any evidence of an official record, and there was a want of proof that the conditions had been complied with, and all the circumstances pointed to fraud, the grant was held to be invalid, and the decree

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confirming it was reversed. *United States v. Bolton*, 23 How. 341.

197. Where the only archive evidence of a Mexican grant of land in California was the petition, the reference for information, and the report, and existence of an actual grant was, under all the circumstances, improbable, the claim was rejected. *Palmer v. United States*, 24 How. 125.

198. A claim to a small lot of land in California, alleged to have been granted in conformity to the usage of the Mexican government to set apart such lots for the use of the Indians settled around the missions, was confirmed on proof that such a grant was made and registered, and that the grantee and his assigns had been long in possession, although the record was lost in the confusion resulting from the occupation of the country by the American forces. *United States v. Wilson*, 1 Black, 267.

199. Alterations in the original papers evidencing a genuine Mexican grant of land in California, made by the grantee after the cession to the United States, with fraudulent intent to enlarge the quantity, held not to avoid the grant as against the heirs of the grantee. *United States v. West*, 22 How. 315.

200. Where a claim to land under the act of June 22, 1860 (12 Sts. 85), for the final adjustment of private land claims in Louisiana, etc., is not supported by production of the original documents, unless there is just ground to suspect their genuineness, the record made to the commissioner to whom the claim was originally presented, under the act of April 25, 1812 (2 Sts. 715), is sufficient evidence, *prima facie*, of their contents. *United States v. Watkins*, 97 U. S. 219.

201. Although the Mexican book of records known as Jimeno's Index is not authoritative proof of grants included in it, nor conclusive against grants not found there, it was held to be evidence in this case of Jimeno's action as governor *ad interim* when the grant in question was made. *United States v. West*, 22 How. 315.

202. Under the Spanish law formerly prevailing in Texas, the papers of the original title, from the government grant to the title of possession, properly belonging to the archives of the general land office, included a power of attorney from the grantee to obtain the possessory title; and copies of such papers, properly certified at that office, are admissible in evidence, and, being admitted, are evidence for any purpose for which the originals might be adduced. *Hanrick v. Barton*, 16 Wal. 166.

203. A grant of four leagues of land in Texas in 1795 should be deemed to mean Spanish leagues, such as were then used in Texas and Mexico, consisting each of five thousand varas; a vara being regarded as equivalent to thirty-three and a third English inches, according to

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common usage prevailing in Texas, although the standard vara is somewhat less than this, and in California is estimated at thirty-three inches. *United States v. Perot*, 98 U. S. 428.

204. In Texas, the protocol of a Mexican title is an archive which may be deposited in the general land office at any time, subject to all just implications arising from delay and the circumstances of its history; and when so deposited, a certified copy thereof from the land office is competent *prima facie* evidence of the title. *Airhart v. Massieu*, 98 U. S. 491.

205. A resolution by the congress of Tamaulipas, adopted after the separation of Texas from Mexico, that on the separation Matamoras had acquired no property in lands across the Rio Grande in Brownsville, by previous proceedings for their expropriation as part of the common lands of the town, because previous compensation had not been made to the owner, although it may not conclude the state of Texas or purchasers from Matamoras, is entitled to the highest consideration as a decision on the law of Tamaulipas, and, in a suit between the privies of the ancient owner and claimants under the city, will be adopted. *Brownsville v. Cavazos*, 100 U. S. 138.

206. The recital in a Spanish grant, of a royal order which did not authorize the grant, held not necessarily to show that the grant was made without authority. *United States v. Clarke*, 8 Pet. 436. See *Strother v. Lucas*, 12 Pet. 410.

207. There is no presumption of the correctness of the return of a private surveyor, employed as the agent of the grantee; the return is a mere private paper, and not evidence. *United States v. Hanson*, 16 Pet. 196.

208. A paper extracted from a Spanish register of land titles in Louisiana, containing only the recitals which usually precede a formal grant, is no evidence of title. *United States v. Le Blanc*, 12 How. 435.

209. The concession by the Spanish governor of East Florida herein held to be not a mere license to cut timber, but a grant of land. *United States v. Richard*, 8 Pet. 470.

210. Where land on the Mississippi in Louisiana forty arpents in depth was granted by the Spanish authorities, a grant of "all the vacant" back land wherein the depth was not specified must be construed, in the light of the usage prevalent at the time of the grant, to embrace an additional forty arpents only. *Slidell v. Grandjean*, 111 U. S. 412.

211. — *Abandonment and Forfeiture of such Titles, and here of Conditions.* Long neglect to perform the conditions on which the grant was made, although conditions subsequent, was considered fatal to the claim, as proving an abandonment. *Fuentes v. United States*, 22 How. 443.

212. A claim founded on a Spanish concession made in 1799, no survey having been made, no



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possession having been taken, nor any act done under the order, held to have been abandoned, and the inchoate title extinguished. *United States v. Hughes*, 13 How. 1; *United States v. Hughes*, Id. 4; *United States v. Hughes*, Id. 7.

213. A claim founded on a Spanish order of survey issued in 1791, no survey having been made, no possession having been taken, nor any act done under the order, held to have been abandoned and the inchoate title extinguished. *United States v. Simon*, 12 How. 433.

214. In passing on claims under Mexican grants of land in California, the question is, what right had the claimant under the Mexican authorities when those authorities were displaced on July 7, 1846. The court cannot declare a forfeiture for anything done or omitted to be done by the claimant after that date. *Hornsby v. United States*, 10 Wal. 224.

215. After a lapse of nearly forty years, it is to be presumed that the grantee under a Spanish grant of lands in Louisiana, who never complied with the conditions thereof under the law, has surrendered his purchase and had his money refunded. *United States v. Moore*, 12 How. 209.

216. A grant of land in East Florida, on a condition precedent, held, the condition not having been performed and no excuse being shown, invalid against the United States. *United States v. Mills*, 12 Pet. 215 [BALDWIN, J., dissenting]; *United States v. Kingsley*, Id. 476 [BALDWIN, J., dissenting]; *United States v. Drummond*, 13 Pet. 84; *United States v. Burgevin*, 13 Pet. 85; *Buyck v. United States*, 15 Pet. 215; *O'Hara v. United States*, 15 Pet. 275.

217. This, although perfect Spanish titles to land in Florida are exempt from the provisions of article 8 of the Spanish treaty of cession, and need no confirmation. *United States v. Wiggins*, 14 Pet. 334; *De Vilemont v. United States*, 13 How. 261.

218. A condition in a Mexican grant of land in California inconsistent with the public policy of the United States will be deemed to have been annulled by the conquest. *Fremont v. United States*, 17 How. 542.

219. A recital in a Spanish grant of one of its considerations will not be deemed a condition, if the grant be in terms absolute, unless declared to be so. *United States v. Rodman*, 15 Pet. 130.

220. There was no Spanish ordinance engrafting conditions on mill grants. *United States v. Hanson*, 16 Pet. 196.

221. A condition in a Spanish grant of land in Florida, made before the Spanish treaty of February 22, 1819 (8 Sts. 252), that the grantee settle two hundred families on the land granted within a certain time, was held to be a condition subsequent, and performance thereof to be excused in equity by circumstances and the change of jurisdiction. *United States v. Arredondo*, 6 Pet. 691.

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222. A Spanish concession in consideration of the introduction of a colony conferred no right to a title in form, in advance of compliance with the conditions constituting such consideration. *Glenn v. United States*, 13 How. 250.

223. Where a Mexican grant was for a definite quantity of land, the boundary on three of the four sides being given, and a dispute as to boundary arose between the grantee and a claimant of contiguous land, which dispute was settled by the parties by agreement, and a new grant was made with boundary according to the agreement, and a condition that a survey should be made and a map filed, the condition was held to be a condition subsequent, of which performance was dispensed with by the disturbed condition of the country. *United States v. Vaca*, 18 How. 556.

224. The effect of conditions subsequent respecting occupation, improvement, and non-alienation, in a Mexican grant of land in California. *Fremont v. United States*, 17 How. 542.

225. A Mexican grant on condition that the grantee obtain judicial possession, have the land surveyed, and build a house thereon, was not avoided by non-performance of the conditions, when performance was rendered impossible by the disturbed condition of the country. *United States v. Reading*, 18 How. 1.

226. And failure to perform such conditions would not amount to a forfeiture in the absence of circumstances showing an intention to abandon. *Id.*

227. The want of a condition requiring cultivation and habitation will not avoid a grant. *United States v. Larkin*, 18 How. 557.

228. The want of the usual conditions requiring cultivation, inhabitancy, etc., in a Mexican colonization grant, does not affect its validity. *United States v. Yorba*, 1 Wal. 413.

229. The condition of inhabitancy and cultivation within a certain time, annexed to an imperfect title derived from the Spanish government in the Louisiana territory, a title, *e. g.*, resting on a mere order of survey, must be considered, whether under the act of June 22, 1860 (12 Sts. 85), for the final adjustment of land claims in Louisiana, etc., or acts prior thereto, as material and essential, as they were under the laws of the Spanish government, and as fatal to the claim if not complied with. *McMicken v. United States*, 97 U. S. 204.

230. Where a Mexican grant of land in California was subject to an inquiry as to whether the land was vacant, and on condition that the grantee furnish a *diseño* and inhabit and cultivate, and nothing was done under the grant for eleven years, when the grantee sold his claim two days before it was filed before the commissioners, and there was no *expediente* found in the archives, no delivery of possession, and no approval by the departmental assembly, the grantee was deemed to have abandoned the grant, and the claim

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was rejected. *United States v. Noe*, 23 How. 312.

231. A French grant of 1750 of land in what is now the state of Michigan, made on condition of occupancy and improvement, with which there was no substantial compliance, and not asserted until 1825, forty-two years after the United States had come into possession, and after it had extinguished the Indian title and surveyed and offered the land for sale, etc., was held not good as against the United States. *United States v. Repentigny*, 5 Wal. 211.

232. A grant of surplus land to a certain amount remaining in specified places after satisfying certain prior grants to other persons, upon condition that the grantee should solicit juridical possession, held not forfeited by failure to fulfil the condition, mere neglect in such case not working a forfeiture, but merely leaving the land open to denouncement by other persons desiring a grant of the land, a denouncement, by the Mexican law, being necessary to effect a divestiture in such a case. [CLIFFORD, SWAYNE, and DAVIS, JJ., dissenting.] *Hornsby v. United States*, 10 Wal. 224.

233. The date of a treaty, as respects performance of the conditions of a grant by a private grantee whose right the treaty assumes to save, is the time of its final ratification. [THOMPSON, J., dissenting.] *United States v. Arredondo*, 6 Pet. 691.

234. The time allowed by the United States for the performance of conditions did not run after the date of the act of March 26, 1804 (2 Sts. 287). *Glenn v. United States*, 13 How. 250; *De Vilemont v. United States*, Id. 261.

235. The provision of that act which so limited the time was valid. *Ib.*

236. The condition on which the concession herein was made, held to have been seasonably performed. *United States v. Sibbald*, 10 Pet. 313.

237. There could be no confirmation under the act of March 2, 1805 (2 Sts. 324), where the grantees or their representatives were not resident within the territory, and the land was not actually inhabited and cultivated by the grantees, or for their use, on October 1, 1800. *United States v. D'Auterive*, 10 How. 609.

238. A grant under the Mexican colonization laws of 1824 and 1828 may not be declared forfeited where the grantee has settled on the land in good faith, although all conditions subsequent have not been complied with. *United States v. Sutter*, 21 How. 170.

239. Where part of the land claimed under a Spanish title was granted to the claimant by act of congress, and accepted, without any saving of the residue of the claim, a compromise and satisfaction of the entire claim must be presumed. *United States v. Roselius*, 15 How. 31.

240. And it makes no difference therein

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whether the title was complete or perfect under or by virtue of the French or Spanish grant, or was made so by act of congress. *Ib.*

241. A native of the United States, naturalized as a citizen of Mexico, did not forfeit his right under a Mexican grant, by joining the federal forces when they took possession of California, nor can he be deemed thereby to have abandoned the land. [DANIEL, J., dissenting.] *United States v. Reading*, 18 How. 1.

242. — *Direct Legislative Confirmation of Inchoate Titles derived from such Governments.* In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may, if it please, act by legislation directly on a claim preferred, withdrawing it from further consideration of the courts under a general statute. *Grisar v. McDowell*, 6 Wal. 363.

243. Congress has power to confirm claims under Spanish grants to lands in the disputed territory between the Mississippi and the Perdido. *Pollard v. Kibbe*, 14 Pet. 353. See *Mobile v. Eslava*, 16 Pet. 234; *Mobile v. Hallett*, 16 Pet. 261; *Mobile v. Emanuel*, 1 How. 95; *Pollard v. Files*, 2 How. 591.

244. This, although the Spanish authorities could not make valid titles to lands west of the Perdido, after the cession of Louisiana to the United States by the French treaty of 1803, those lands having been included in that cession. *Pollard v. Files*, 2 How. 591.

245. There is no act of congress confirming titles defective by reason of a cession of the territory by the granting power before the grant was made. *United States v. D'Auterive*, 10 How. 609.

246. Confirmation by act of congress of a claim to land confers a legal title without a patent. *Grignon v. Astor*, 2 How. 319; *Chouteau v. Eckhart*, Id. 344.

247. The act of July 4, 1836 (5 Sts. 126), confirming claims to land in Missouri, excepted from its operation lands confirmed by previous acts. *Les Bois v. Bramell*, 4 How. 449.

248. Lands granted by the act of March 3, 1807 (2 Sts. 437), in fulfilment of the second article of the British treaty of 1794, were not donations, and the taking of them did not prevent a settler from receiving a donation under the acts of May 15, 1820, and March 3, 1823. (3 Sts. 605, 786). *Forsyth v. Reynolds*, 15 How. 358.

249. The act of 1807 did not grant legal titles, but merely enabled the owners of inchoate titles to obtain patents. *Burgess v. Gray*, 16 How. 48.

250. That act, confirming the decisions of commissioners appointed to examine the claims of French settlers on land in the Northwestern Territory, gave title to such a settler, without regard to the patent provided for by section 5; a

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legislative confirmation of a claim to land being a recognition of the validity of such claim and operating as effectually as a grant. *Langdeau v. Hanes*, 21 Wal. 521.

251. The act of June 13, 1812 (2 Sts. 748), confirming commons in St. Louis, etc., excepted out of its operation only lands the claims whereof had been confirmed by the board of commissioners organized under the act of March 2, 1805 (2 Sts. 324). *Les Bois v. Bramell*, 4 How. 449.

252. Under that act and the act of May 26, 1824 (4 Sts. 65), concerning town and village lots in Missouri, it was not competent for the recorder to give a certificate of confirmation in 1839, and thereby divest a title before then acquired from the United States. *Gamache v. Piquignot*, 16 How. 451.

253. Under the act of 1812, it was not necessary that the claimant of an out-lot should have had a written recognition of his title, or any public survey, under any authority, whether French, Spanish, or federal. *Guillard v. Stoddard*, 16 How. 494; *Savignac v. Garrison*, 18 How. 136.

254. Nor was he required, by the supplementary act of May 26, 1824 (4 Sts. 65), to present the evidence of his claim and have it recognized, although he might do so, and thus estop the United States and claimants thereunder by subsequent grant. *Ib.*

255. But he might rely on proving the facts necessary to his title under the act of 1812, by parol, if his possession should be disturbed. *Guillard v. Stoddard*, 16 How. 494.

256. Section 1 of the act of 1812 confirmed, *proprio vigore*, the rights, titles, and claims thereby embraced, and operated as a grant to all intents and purposes; and it operated on the right of an inhabitant of a village therein named to an out-lot, whose title thereto had been confirmed on petition by the commissioners for adjusting claims to land in said territory, and this notwithstanding the proviso that the act should not affect any confirmed claims to the same lands. *Ryan v. Carter*, 93 U. S. 78.

257. By the law of Missouri, an imperfect title by Spanish concession was the subject of sale and mortgage. Hence, where congress confirmed a claim under such a concession to a mortgagor thereof or his representatives, although it had been once rejected by the commissioners, it inured to the benefit of a purchaser under a foreclosure of the mortgage, and not to the heirs of the mortgagor. *Massey v. Papin*, 24 How. 362.

258. The act of July 1, 1864 (13 Sts. 332), confirmed the titles held under the ordinance of San Francisco known as the Van Ness ordinance, and took effect by relation as of the time when the act of the state legislature confirming the ordinance was passed. *Merryman v. Bourne*, 9 Wal. 592.

259. Where an act confirming a Mexican land grant provided for a survey, and declared that

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the confirmation should not be legally effective until the confirmer should have paid the expense of so much of the survey as should inure to his benefit, it was held that until this was done the vesting of the title was suspended, and that the land was not subject to taxation. *Colorado Co. v. Commissioners*, 95 U. S. 259.

260. The act of March 8, 1866 (14 Sts. 4), to quiet the title to certain lands in San Francisco, conferred no rights on trespassers, but only on those whose possession was *bona fide*. *Trenouth v. San Francisco*, 100 U. S. 251.

261. Where an act confirms a claim with external boundaries clearly defined or capable of identification, but provides that the confirmation shall not extend to land occupied by the United States for military purposes, one who asserts title under a later patent must show that, by reason of occupancy for military purposes, the land he claims was not included in the confirmation. *Whitney v. Morrow*, 112 U. S. 693.

262. The action of congress in confirming a private land claim in New Mexico, "as recommended for confirmation by the surveyor-general" of that territory, is not subject to judicial review. *Tameling v. United States Freehold & Emigration Co.*, 93 U. S. 644.

263. An act of congress confirming the decisions of commissioners appointed to adjust claims to lands founded on grants from a former government, so far as it is a confirmation of a claim indefinite as to quantity and stating no boundary, is, necessarily, void for uncertainty. *Slidell v. Grandjean*, 111 U. S. 412.

264. The act of May 11, 1820, § 1 (3 Sts. 573), did not confirm a claim to land in Louisiana which the register and receiver in their report erroneously classed among claims already confirmed, although in point of fact not then confirmed. *Blanc v. Lafayette*, 11 How. 104.

265. — *Confirmation through Commissioners, etc.* — In general, and here of Acts providing therefor and of Proceedings by Commissioners and Courts, Jurisdiction, Parties, Subject-matter, Practice, Limitation.] The act of May 26, 1824 (4 Sts. 52), gave no additional strength to incomplete French and Spanish titles, but merely provided the means for their completion. *United States v. Reynes*, 9 How. 127.

266. Nor did the act of June 17, 1844 (5 Sts. 676), give them any; it only extended the operation of the former act to other territory. *Ib.*

267. The act of 1824 had no effect on complete or perfect titles. *Ib.*; *United States v. Philadelphia*, 11 How. 609; *United States v. Castant*, 12 How. 437; *United States v. Pillerin*, 13 How. 9; *United States v. McCullagh*, 13 How. 216; *United States v. D'Auvergne*, 15 How. 14; *United States v. Roselius*, 15 How. 31; *United States v. Roselius*, 15 How. 36; *United States v. Ducros*, 15 How. 38; *Trenier v. Stewart*, 101 U. S. 797.

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268. Nor had the act of 1844. *United States v. Reynes*, 9 How. 127.

269. A title to land in Louisiana under a French grant confirmed by Spain after its acquisition of the territory, was complete, and therefore not within the contemplation of the act of 1824. *United States v. Pillerin*, 13 How. 9.

270. The act of 1824, and the act of 1844 re-enacting it and extending its provisions to Mississippi and other states, were intended to remain in force until all appeals regularly brought up thereunder from the district courts were finally disposed of. *United States v. Boisdoré*, 8 How. 113.

271. The act of March 3, 1851 (9 Sts. 631), respecting private land claims in California, required legal as well as inchoate titles to be examined and passed upon by the court. *Fremont v. United States*, 17 How. 542.

272. The act of April 12, 1814 (3 Sts. 121), did not confirm titles which had been rejected for reasons other than the want of evidence of inhabitancy on December 20, 1803. *Burgess v. Gray*, 16 How. 48.

273. The act of April 29, 1816, § 1 (3 Sts. 328), confirmed no claims to a quantity of land exceeding one league square. *United States v. King*, 3 How. 773.

274. The act of March 3, 1851 (9 Sts. 631), passed to assure the rights to private property under the treaty ceding California to the United States, recognizes both legal and equitable rights, and should be administered in a liberal spirit. *United States v. Moreno*, 1 Wal. 400.

275. By that act, the United States declared the conditions under which they would discharge their political obligations to Mexican grantees of land in California. *Beard v. Federy*, 3 Wal. 478.

276. Section 14 of that act, which declares that claims to city, town, or village lots in certain cities, towns, and villages shall be presented by the corporate authorities, has no application to claims to lots held adversely to the corporations by independent titles, but only to those lots owned or claimed by such corporations; and hence the commissioners under that act had jurisdiction of a claim under a grant of a lot by a Mexican governor, within the limits of the pueblo of San Francisco, presented in the name of the grantee. *Lynch v. Bernal*, 9 Wal. 315.

277. The act of June 22, 1860 (12 Sts. 85), for the final adjustment of claims to land in Florida, Louisiana, etc., confirmed all Spanish grants of land between the Mississippi and the Perdido, made after the treaty of St. Ildefonso, — even grants that had been rejected under prior laws, — and impliedly repealed that part of the act of March 26, 1804 (2 Sts. 287), which declared them void. [CLIFFORD, J., dissenting.] *United States v. Lynde*, 11 Wal. 639.

278. That act, although it contained some re-

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medial provisions, and removed any objection to grants otherwise sustainable on the principles of justice arising from want of title in the government in possession when the grants were made, affords no aid to claims invalid in 1815 or 1825 from any intrinsic defect, as, *e. g.*, for want of compliance with a condition of inhabitancy and cultivation. *McMicken v. United States*, 97 U. S. 204.

279. A grant, by Spanish authority, of land in the territory of Louisiana, made pursuant to a sale thereof, and while that government had possession and claimed the sovereignty of the country, was within the purview of the act of 1860, although, according to the views of our government, the title of Spain had terminated when the grant was made. *United States v. Watkins*, 97 U. S. 219.

280. The word "sold," in § 6, act of 1860, which provides that where land, title to which is confirmed, has been sold by the government, the claimant shall have the right to enter a like quantity of other public land, must be construed to mean "sold or otherwise disposed of." *Id.*

281. Section 14 of the act of 1804 declaring void certain grants of land in Louisiana, was not affected by the act of 1824, nor by that of 1844. *United States v. Reynes*, 9 How. 127.

282. It was not the duty of commissioners to settle disputes between several assignees of a Mexican grantee, but merely to establish the validity and the boundary of the grant as between the grantee and the government. *United States v. Grimes*, 2 Black. 610.

283. The commissioners appointed pursuant to the act of March 3, 1803 (2 Sts. 229), had power to hear evidence as to the time of the evacuation by the Spanish troops, and to decide on the fact. *Ross v. Barland*, 1 Pet. 655.

284. The act of April 25, 1812 (2 Sts. 713), and acts subsequent, requiring French, Spanish, and British claims to be recorded, did not bar unrecorded claims as against the United States, but only as against their grantees. *United States v. Power*, 11 How. 570.

285. *Semble* that if congress authorize a court to examine a private claim to land in which the government is interested, and, in deciding thereon, to be governed by the law of nations and of the country from which the alleged title was derived, objection of alienage is waived. *United States v. Repentigny*, 5 Wal. 211.

286. Where an act confirming the decisions of commissioners appointed to adjust claims to lands based on grants from a former government recites the names of the commissioners, and declares that decisions made by them are confirmed, a decision from which one of them dissented is not confirmed, even though the act creating the commission authorized a majority of its members to hear and decide. *Stidell v. Grandjean*, 111 U. S. 412.

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**287.** Under the act of May 26, 1824 (4 Sts. 52), for the settlement of private land claims in Louisiana, etc., the district court had no power to decide on evidence of naked possession unaccompanied by any proper title. *United States v. Power*, 11 How. 570; *United States v. Rillieux*, 14 How. 189; *United States v. Gusman*, 14 How. 193.

**288.** Under the act of May 26, 1830 (4 Sts. 405), to provide for the settlement of land claims in Florida, the district court had jurisdiction of a claim rejected by the commissioners, such rejection not being deemed final action thereon. *United States v. Percheman*, 7 Pet. 51.

**289.** Under that act the court had no jurisdiction to consider whether a petitioner had conveyed to a third person. *Ib.*

**290.** The jurisdiction conferred by that act for the settlement of land claims in Florida is special and limited, and if the averments in the petition do not bring the case within it, the proceedings are void. *United States v. Clarke*, 8 Pet. 436.

**291.** After May 26, 1831, the courts of Florida had no jurisdiction to receive a petition for the confirmation of a private land claim. *United States v. Marvin*, 3 How. 620.

**292.** Under the act of March 3, 1851 (9 Sts. 631), to settle private land claims in California, the district court had power, where it had dismissed an appeal from a decree of the commissioners rejecting a claim for want of prosecution, to open the case for the purpose of hearing newly discovered evidence as to the claimant's title. *United States v. Rocha*, 9 Wal. 639.

**293.** Under that act the commissioners had jurisdiction of claims to mines as claims to a right in lands. *United States v. Castillero*, 2 Black, 17.

**294.** Prior to the act of June 14, 1860 (12 Sts. 33), the district court had no jurisdiction to relieve where the survey of a Mexican grant was not in conformity to the decree of confirmation, the remedy being by proper application to the commissioner of the land office before issuance of the patent. *United States v. Sepulveda*, 1 Wal. 104.

**295.** That act gives the district court no power to change a decree of confirmation. *The Fossut Case*, 2 Wal. 649.

**296.** In order that the district courts may have jurisdiction of claims to land under French or Spanish concessions under section 11 of the act of 1860, there must have been a complete investiture of title in the original claimant by segregation of the land granted, either by actual survey or by defined, fixed, natural boundaries, or by initial points and courses and distances, prior to the cession to the United States. *Scully v. United States*, 98 U. S. 410; *United States v. Clamorgan*, 101 U. S. 822.

**297.** So there must be something more than

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an incomplete equity, such as may have arisen out of a mere permission to occupy issued by the Spanish commandant. Such a right is to be pursued before the commissioners appointed under the act. *United States v. Baltimore*, 93 U. S. 424.

**298.** The district court may order the survey of a confirmed claim under a Mexican grant of land in California to be returned into that court for examination, and has power to set it aside, or to correct or modify it. *Higuera v. United States*, 5 Wal. 827.

**299.** Land claims arising by virtue of a right or title derived from the Spanish or the Mexican government are required to be presented to the commissioners for adjudication. *Ib.*

**300.** To give jurisdiction to the commissioners, it is not necessary in all cases that the petition allege a grant or concession in writing; it is sufficient if it allege a right or title derived from one of those governments; — and a right or title may rest in the general law of the land. *Beard v. Federy*, 3 Wal. 478.

**301.** The supreme court of Mississippi had no jurisdiction to examine and declare the validity of inchoate Spanish titles, exclusive cognizance of such matters being with the commissioners provided for by the act of March 3, 1803 (3 Sts. 229); and the proceedings of that court in such behalf were void. *Hickey v. Stewart*, 3 How. 750. And see *La Roche v. Jones*, 9 How. 155.

**302.** On an appeal from the district court for the northern district of California, in a proceeding to confirm a Mexican title, the cause was remanded for amendment, because the record did not show that the land lay within the northern district. *Cervantes v. United States*, 16 How. 619.

**303.** A petition for confirmation of a Spanish title in Louisiana, under the act of May 26, 1824 (4 Sts. 52), must contain an allegation of the residence of the grantees in Louisiana on the date of the grant, or on or before March 10, 1804. *United States v. Castant*, 12 How. 437.

**304.** A Mexican claim may be prosecuted for confirmation by the grantees of the original claimant and in the name of their grantor. *United States v. Sutter*, 21 How. 170.

**305.** Under the act of June 17, 1844 (5 Sts. 676), reviving the act of 1824, adverse claimants should be made parties, contrary to the provisions of the act of 1828. *United States v. Moore*, 12 How. 209; *United States v. Davenport*, 15 How. 1.

**306.** The decisions of the commissioners under the act of March 31, 1814 (3 Sts. 116), providing for the indemnification of claimants of public land in the Mississippi territory, and the acts of January 23 and March 3, 1815 (3 Sts. 192, 235), supplementary thereto, were conclusive between the parties in all cases within their jurisdiction. *Brown v. Jackson*, 7 Wheat. 218.

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**307.** The acts of the commissioners appointed to adjust land titles in Louisiana, held conclusive as to titles confirmed in accordance with the acts of congress relating thereto. *Strother v. Lucas*, 12 Pet. 410.

**308.** The courts, in confirming a Spanish title, cannot apply a Spanish custom to survey land clear of water and marsh embraced in the calls, if such custom existed, to a case where there was an actual survey carried into a grant. *United States v. Levy*, 13 Pet. 81.

**309.** Nor can the federal courts give effect to such a custom where no survey has been made, as to do so would be equivalent to making a new concession. *Ib.*

**310.** Final decrees in cases for the confirmation of land claims in California, whether by commissioners or by the district court, are conclusive between the claimants and the government, where no appeal is taken. *Higuera v. United States*, 5 Wal. 827.

**311.** The construction of such decrees must be governed by the ordinary rules of the common law. *Ib.*

**312.** The exception in the decree confirming the claim of San Francisco to the land constituting its site, of such lands as by grants of lawful authority had been vested in private proprietorship and had been confirmed to parties claiming thereunder by federal tribunals, or as might thereafter be confirmed to parties claiming thereunder by such tribunals in proceedings pending therein for that purpose, is not limited to lands claimed under perfect grants, but includes all parcels claimed by private parties, under grants, from the authorities of the former government, the claims to which had been, or might be, subjected to the examination of the federal tribunals. *Lynch v. Bernal*, 9 Wal. 315.

**313.** So of the like exception in the decree confirming the like claim of the city of San José. *Chaboya v. Umbarger*, 97 U. S. 280.

**314.** Where Mexican concessions of land in California were mere floating grants for quantity, the one first located by an approved survey under the act of June 14, 1860 (12 Sts. 33), appropriated the land. *Miller v. Dale*, 92 U. S. 473.

**315.** Where the description in a Mexican grant gave the boundary on three sides, and for quantity a league, "a little more or less," the confirmation was for a league within the specified boundaries. *United States v. Fossat*, 20 How. 413.

**316.** A confirmation of a claim under a Mexican grant of land in California providing for the confirmation of such claims, is limited by the claim made, and cannot be used to maintain the title to land not within the grant. *Brown v. Brackett*, 21 Wal. 387.

**317.** If the decree of confirmation describe the land with precision by reference to natural objects and to courses and distances, a reference to the original title papers for a more particular descrip-

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tion will not control the description given, and will admit of a resort to those papers only in order to explain any ambiguity there may be in the description given. *United States v. Halleck*, 1 Wal. 439.

**318.** Where a decree of confirmation mentions the sea or a bay as a boundary, without more, ordinary high-water mark, as at common law, will be deemed to have been intended. *United States v. Pacheco*, 2 Wal. 587.

**319.** Where the decree is with a proviso that it shall be without prejudice to the rights of any one entitled under the original grantee, but, on the contrary, shall inure to his benefit, a decree on appeal in the supreme court which affirms that decree, so far as it confirms the original grant, does not annul the proviso, but leaves it in full force. *Steinbach v. Stewart*, 11 Wal. 566.

**320.** Under the acts of March 2, 1805, and March 3, 1807 (2 Sts. 324, 440), confirmation by the commissioners of a Louisiana land claim did not necessarily inure to the benefit of the holder of the true French or Spanish title. *Strother v. Lucas*, 6 Pet. 763.

**321.** Thus, where the French twice conveyed, and possession went with the junior title, and its holder presented his claim and it was confirmed, and the holder of the senior title omitted to act under the laws of congress, the latter was held entitled to no benefit from the confirmation. *Ib.*

**322.** Confirmations inured to the benefit of claimants, although holding by derivative titles. *Strother v. Lucas*, 12 Pet. 410.

**323.** Under the act of 1805, an assignee of a Spanish concession might prosecute the claim thereunder and obtain a confirmation in the name of the original owner, and the title, when confirmed, inured to the benefit of the assignee. *Bissell v. Penrose*, 8 How. 317.

**324.** And this, where the claimant presented to the commissioners evidence of his derivative title, as well as of the original title, although the claimant's name was omitted in the form of confirmation. *Connoyer v. Schaeffer*, 22 Wal. 254.

**325.** A confirmation to the original claimant and his legal representatives, under the act of July 4, 1836 (5 Sts. 126), inured by way of estoppel to the claimant's assignee. *Stoddard v. Chambers*, 2 How. 284.

**326.** To avoid a confirmation under section 2 of that act, it must be shown that the opposing location was made "under a law of the United States," etc. *Ib.*

**327.** If one claiming an interest as assignee of the heirs of the original grantee do not satisfactorily prove the assignment, the confirmation will be to the grantee's legal representatives. *United States v. Patterson*, 15 How. 10.

**328.** Where a Mexican grant of land in California is confirmed, it inures to the benefit of an assignee of the grantee, so that after a confirmation the court will not consider the claim of an

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assignee as that of a separate claimant. *United States v. Grimes*, 2 Black, 610.

**329.** Confirmation to the original grantee or his "legal representatives" embraces representatives by contract as well as representatives by operation of law; but it leaves the question as to the person to whom it shall inure open to inquiry in a court of justice. *Hogan v. Page*, 2 Wal. 605.

**330.** Where a Mexican title has been confirmed in the name of the original grantee, one claiming under him by a prior assignment, whether he claim title to the whole of the land, or to a part only, cannot have a separate confirmation of title; but on the issue of a patent he may resort to a court of equity for the enforcement of his rights, the original confirmation inuring to his benefit. *United States v. Covilland*, 1 Black, 339.

**331.** Although, in general, the court, if satisfied of the validity of the title of the concessionee, may make a decree in favor of his legal representatives for the benefit of whom it may concern, it may not at suit of one who shows no connection with the title sought to be established. *McMicken v. United States*, 97 U. S. 204. And see *United States v. Watkins*, 97 U. S. 219.

**332.** Where an inchoate Spanish title to land in the Missouri territory was seized and sold on execution under the local law, pending proceedings before commissioners for confirmation of title, the perfect title under the patent subsequently issued to the debtor, pursuant to the decision of the commissioners, inured to the execution purchaser by relation, and also, the patentee being dead, because, under the act of May 20, 1836 (5 Sts. 31), the purchaser would be preferred to the devisees. *Landes v. Brant*, 10 How. 348.

**333.** A decree of such board of commissioners or of a federal court takes effect, by relation, as of the day when the claim was presented to the board; hence, a purchaser from the claimant, pending the claim, takes subject to the decree. *Grisar v. McDowell*, 6 Wal. 363.

**334.** Where, by order of the district court under the act of June 14, 1860 (12 Sts. 33), a party not claiming under the United States is allowed to intervene in proceedings to correct a survey of a Mexican grant in California, the order is a determination that the party has such an interest under the Mexican government as entitles him to contest the survey; and objection to the intervention on the ground of the want of such interest cannot be taken for the first time on appeal in the supreme court. *Alviso v. United States*, 8 Wal. 337.

**335.** Where the evidence as to the line between two Mexican grants is conflicting and irreconcilable, the supreme court will not interfere with the decision of the court below. *Ib.*

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**336.** A claim to a Mexican grant of land in California, having been rejected by the commissioners and by the district court, was rejected in the supreme court as fraudulent. *Luco v. United States*, 23 How. 515.

**337.** Where a Mexican grant of land in California was established as genuine on the evidence, and the decree confirming it affirmed, no directions were given in the supreme court as to its location, because the question was not raised below. *United States v. Berreyesa*, 23 How. 499.

**338.** A third person, whose right, if any, is barred as against the United States, cannot intervene to assert his title in proceedings on a petition for confirmation. *United States v. Patterson*, 15 How. 10.

**339.** Nor can a petition, seasonably filed by one who discovers afterwards that he has no title, by the filing of a supplementary petition after the expiration of the time limited, be made to inure to the benefit of one whose claim, if asserted seasonably, might have been asserted successfully. *United States v. Innerarity*, 19 Wal. 595.

**340.** The supreme court will not consider objections to a claim on the ground of fraud, if made for the first time in that court. *United States v. Larkin*, 18 How. 557.

**341.** The intervention of adverse claimants before commissioners appointed under the act of March 3, 1851 (9 Sts. 631), should not be encouraged. *United States v. Fossat*, 20 How. 413.

**342.** Where a valid grant was made by the Mexican government, the United States have no interest, and the federal courts will not permit the authority of the federal government to be interposed against a claimant on the ground that another claimant has a better right; and if the court below permit it, the supreme court will reverse and remand the cause that the conflicting rights may be contested under that act. *United States v. White*, 23 How. 249.

**343.** The court will not disturb the location of a confirmed Mexican claim, at the instance of a third person, the government and the original claimant being satisfied, where such person shows no title to any part of the land covered by the survey. *Dehon v. Bernal*, 3 Wal. 774.

**344.** Nor, although some elements of location prescribed by the decree of confirmation are not complied with, if the survey conform as nearly as it may. *Ib.*

**345.** The United States cannot object to the correctness of a boundary line in an approved survey, where it has not appealed from the approving decree. *Alviso v. United States*, 8 Wal. 337.

**346.** Under the act of May 26, 1830 (4 Sts. 405), concerning land claims in Florida, if no question as to the authenticity of title papers be made in the court below, proof thereof cannot

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be required in the supreme court on appeal. *United States v. Delespine*, 15 Pet. 319.

347. In general, where there is no want of archive evidence of the usual preliminary proceedings, to give rise to a suspicion as to their genuineness, objections to the sufficiency of proof of the execution of the grant must be taken in the court below, and not for the first time in the supreme court. *United States v. Auguisola*, 1 Wal. 352; *United States v. Yorba*, Id. 412.

348. The court, proceeding under the act of May 26, 1824 (4 Sts. 52), could not make an indefinite decree for the petitioner, for so much as the government might have sold of the land adjudged to belong to him, but was bound to ascertain the precise quantity. *United States v. Moore*, 12 How. 209.

349. If claimants through federal grants of part of the lands claimed under a Spanish grant in Louisiana be not joined, no decree can be made for the petitioner as to that part. *United States v. Davenport*, 15 How. 1; *United States v. Roselius*, Id. 31.

350. But a statement in the petition that the title is perfect will not defeat the jurisdiction on that ground, if it be also apparent thereon that the title emanated from an officer who could grant only an inchoate one. *United States v. Davenport*, 15 How. 1.

351. In a case of which the court has no jurisdiction under that act, because the title presented is perfect and not inchoate, the court cannot give compensation by way of floating warrant, under section 11, for a part of the land granted to another by the United States. *United States v. Roselius*, 15 How. 31.

352. What is evidence of an assignment of a land claim to go to the jury. *Hogan v. Page*, 2 Wal. 605.

353. Appeals from decrees confirming Mexican grants should not come up as on bills of exception to evidence: where there is suspicion of fraud or forgery, the defence should be made below, and the evidence in support of the charge should appear on the record. *United States v. Johnson*, 1 Wal. 336; *United States v. Auguisola*, Id. 352.

354. Under the act of March 3, 1851 (9 Sts. 631), the transfer of a case heard by commissioners to the district court for California, although by the act denominated an appeal, is to be deemed the institution of an original proceeding. *United States v. Ritchie*, 17 How. 525.

355. A proceeding in the district court on appeal in such case is an original proceeding in which the whole case is open. *Grisar v. McDowell*, 6 Wal. 363.

356. Appeals under that act are subject to the general regulations of the judiciary acts, and hence must be prosecuted to the first succeeding term after their allowance. *Castro v. United States*, 3 Wal. 46.

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357. Where the controversy is wholly between rival individual claimants, the government having and claiming no interest, the court has no jurisdiction of an appeal, although taken by the government, the act of 1851 contemplating nothing more than a separation of the land of individuals from the public domain. *United States v. Morillo*, 1 Wal. 706.

358. Where the want of interest in the government is shown only by admission of government counsel, the appeal must be dismissed; the decree for the appellee cannot be reversed without proof of that fact. *Ib.*

359. Section 12, act of August 31, 1852 (10 Sts. 99), providing that the filing of a transcript with the clerk of the district court should operate, *ipso facto*, as an appeal, dispensed with the petition and answer in that court required by section 9 of the act of 1851. *United States v. Ritchie*, 17 How. 525.

360. That clause of section 12 which enacts that the appeal from the board of commissioners "shall be regarded as dismissed," unless notice of the appeal is given within six months from the filing of the transcript, is mandatory, and neither sickness of counsel nor other hardship will enable the court to hear the appeal where the notice is not so given. *Yturbe v. United States*, 22 How. 290.

361. Under that provision of the act, if the attorney-general give notice of intention not to prosecute, the appeal is, for all legal purposes, in fact dismissed, and the district court may give the claimant leave to proceed on the decree of the commissioners as on a final decree. *Beard v. Federy*, 3 Wal. 478.

362. If the United States take no appeal from a decree confirming a claim under a Mexican grant of land in California, it may appear as appellee, but cannot demand a reversal or change of the decree. *The Fossat Case*, 2 Wal. 649.

363. Under the act of June 14, 1860 (12 Sts. 33), relating to the survey of Mexican grants of land in California, no one who did not intervene in the court below can be heard in the supreme court on appeal, in opposition to the survey approved. [MILLER and DAVIS, JJ., dissenting.] *United States v. Estudillo*, 1 Wal. 710.

364. Whether parties were permitted to intervene should appear by the record. [MILLER and DAVIS, JJ., dissenting.] *Ib.*

365. An appeal lies to the supreme court from a decree of the district court for California in a proceeding under the act of 1860. *The Fossat Case*, 2 Wal. 649.

366. An appeal to the supreme court in cases brought before the commissioners for the settlement of claims to land in California suspends the operation and effect of the decree only where by the judgment of that court the claim of the conferee may be defeated. *Grisar v. McDowell*, 6 Wal. 363.



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367. From orders by the district court directing that a survey of a confirmed claim under a Mexican grant in California be returned into court for examination, parties may appeal. An appeal, however, does not open the decree of confirmation; that decree is the foundation of the survey. *Higuera v. United States*, 5 Wal. 827.

368. Where the district court affirms the validity of a Mexican grant, and the claimant alone appeals, and seeks but a modification of the decree as to the quantity of land conveyed, the validity of the grant is not open to consideration. *Malarin v. United States*, 1 Wal. 282.

369. Where a Spanish grant of land in Louisiana is not confirmed by reference to ascertained boundaries specifically set forth in the order of the commissioners so that the tract can be located without a survey, a survey will be necessary to attach the grant to any particular tract. *Ledoux v. Black*, 18 How. 473; *Snyder v. Sickles*, 98 U. S. 203.

370. And until a location is made by a survey, no title passes; and such location will not defeat a title acquired under an intervening entry and patent. *Ledoux v. Black*, 18 How. 473.

371. In such case the survey, when made, is at law conclusive. *Stanford v. Taylor*, 18 How. 409.

372. And evidence of possession of different land is not admissible to prove that the survey was erroneous. *Ib.*

373. Where the concession was of a tract of a certain form, or its equivalent, in the event that the situation named would not permit that form, it was held, as the whole quantity could not be surveyed in that form at the place named, that the residue was properly surveyed elsewhere. *United States v. Sibbald*, 10 Pet. 313.

374. The land to which a title under a grant by the Mexican governor of California of a certain number of square leagues within a certain district is to attach, must be ascertained by a survey made under the authority of federal laws and in the mode thereby prescribed. *Fremont v. United States*, 17 How. 542.

375. Where such a grant does not identify the precise tract granted, either by description or by reference, as, for instance, where it leaves one side of the tract undefined, the title is not perfect, and needs further action on the part of the government of the United States, as by a survey, to make it so. *Carpentier v. Montgomery*, 13 Wal. 480.

376. Where the decree confirming a claim under such a grant fixes the boundaries, the survey must be in reasonable conformity thereto or it cannot be sustained. *United States v. Halleck*, 1 Wal. 439; *The Fossat Case*, 2 Wal. 649.

377. In making such surveys the surveyor is bound by the decree of confirmation, so far as it fixes location, boundary, or quantity. *Castro v. Hendricks*, 23 How. 438.

**LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS — continued.**

378. And his acts are under the control and supervision of the commissioner of the general land office; if a survey be manifestly wrong, the commissioner may properly refuse to issue a patent. *Ib.*

379. The survey not being conformable to the grant, a new one was ordered. *United States v. Seton*, 10 Pet. 309.

380. A survey set aside by the secretary of the interior for variance from the calls of the grant is without effect, and the question of its correctness is not for the jury. *Snyder v. Sickles*, 98 U. S. 203.

381. The supreme court having affirmed a decree of the court below for a specific tract ascertained by a survey made under the order of the court below, it was held that the latter court could not, on petition, correct any alleged mistake in that survey. *Chaires v. United States*, 3 How. 611.

382. A mere plat, without any written description by metes and bounds, is not evidence of a survey under the act of March 3, 1823 (3 Sts. 786). *Ballance v. Papin*, 19 How. 342.

383. Where the boundaries of a Mexican grant of land in California designated by a decree of confirmation embrace more than the quantity the claim to which is confirmed, the grantee may make his selection therein, restricted only by the requirement that the land selected be in one compact body, and perhaps by selections made by previous residence or by sales or leases. *United States v. Pacheco*, 2 Wal. 587.

384. Although the holder of a grant of a specified quantity of land within limits embracing a much larger quantity is in general permitted to select subject only to the restriction that the selection be made in one body and in a compact form, the government is not bound to accord that privilege, and it may not be exercised in such manner as to defeat prior equities. *United States v. Armijo*, 5 Wal. 444.

385. *Semble* that, in locating land under a confirmed Mexican grant, compactness of form and conformity to the lines of public surveys must be observed, to the disregard, if necessary, of selections made by the grantee, as indicated by settlement or sale or lease. *The Sutter Case*, 2 Wal. 562.

386. But it seems also that the location may be in two parcels where, from the character of the country, the entire quantity cannot be located in one. *Ib.*

387. Whether the land selected is in a form reasonably compact depends on circumstances, such as the character of the country, its division into parcels by mountains, rivers, or lakes, and sometimes on the relation of the tract to neighboring grants. *United States v. Armijo*, 5 Wal. 444.

388. The holder of any interest, however small, in a claim to land in California, has a right, whatever his motive, to insist on a fair

**LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS — continued.**

location of the quantity granted, however much it may clash with the wishes of his co-owners. *Ib.*

389. A survey of land located on confirmation under the act of April 25, 1812 (2 Sts. 713), made under the certificate of the register and receiver in 1846, constituted a good title as against the United States, and a *prima facie* title against all persons. *Cousin v. Labatut*, 19 How. 202.

390. But until it was made, the United States had a right to sell and convey to another, who, if he obtained a patent before it was made, had a paramount title. *Ib.*

391. Under the act of March 3, 1807 (2 Sts. 440), a claimant of land in Missouri obtained no title to any particular tract by mere decision of the commissioners; it was necessary to fix the location by a survey before title could attach. *West v. Cochran*, 17 How. 403.

392. A part of a tract of land in Missouri, claimed under a Spanish concession, having been sold by the United States, it was held, the concession being confirmed, that the claimant was entitled to enter an equal quantity, to be located on the public lands for sale in the same state. *Soulard v. United States*, 10 Pet. 100.

393. If, under the act of May 26, 1830 (4 Sts. 405), concerning land claims in Florida, any limitation of time for the filing of petitions is to be implied, the period cannot be less than a year from the date of that act. *United States v. Delespine*, 15 Pet. 319.

394. The act of May 26, 1824 (4 Sts. 52), revived by that of June 17, 1844 (5 Sts. 676), limited the right to file a petition under a French or Spanish grant to two years from the passage of the latter act. *United States v. Porche*, 12 How. 426.

395. Where commissioners under the act of March 3, 1851 (9 Sts. 631), relating to California land claims, confirmed a claim for the quantity alleged, and the decree was acquiesced in for seventeen years, a petition to the district court for leave to change the original petition by inserting a claim for a greater quantity, and for confirmation of the increased claim, held too late, the jurisdiction of the commissioners having ceased, none having been conferred on the court, and the claimants being without statutory remedy. *Williams v. United States*, 92 U. S. 457.

***Jurisdiction of Supreme Court in California Land Cases — Appellate.***

See SUPREME COURT — JURISDICTION, 58, 59.

***Mexican Claim to Land still pending in the Courts, but an Equity.***

See EJECTMENT — IN GENERAL, 31.

***Mexican Grants of Land in California — Surveys, etc.***

See LANDS OF UNITED STATES — CONFLICTING CLAIMS.

**LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS — continued.**

***Pre-emption Rights — How affected by Claims under such Grants.***

See LANDS OF UNITED STATES — PRE-EMPTION.

**LANDS OF UNITED STATES — LAND OFFICE —**

***Land Officers — Their Powers, Duties, etc.***

See pl. 1-21.

***Their Acts, when reviewed and how controlled.***

See pl. 22-46.

***Records, etc., of the Land Office — What a Part and of what, Evidence.***

See pl. 47-50.

1. — *Land Officers — Their Powers, Duties, etc.* If it be admitted that the register and receiver of a land office have jurisdiction to decide on the facts of a pre-emption claim, yet if they assume to grant land which congress has declared shall not be granted, their act will be void as extending to a subject-matter not within their jurisdiction. *Wilcox v. Jackson*, 13 Pet. 493.

2. Under the act of May 8, 1822 (3 Sts. 699), the register and receiver had no authority to decide on conflicting titles, but only on conflicting locations in cases of imperfect title. *Barbarie v. Mobile*, 9 How. 451; *Tate v. Carney*, 24 How. 357. See *Barbarie v. Eslava*, 9 How. 421.

3. And their decisions on such titles are not conclusive of the facts on which they act. *Tate v. Carney*, 24 How. 357.

4. Nor have a register and receiver a right to reconsider and annul certificates granted by their predecessors many years before, under which the land has been held in possession and *bona fide* titles acquired. *Ib.*

5. Under the act of March 3, 1817 (3 Sts. 380), passed to carry into effect the treaty of August 9, 1814, with the Creeks, the secretary of the treasury was authorized to decide when an Indian reservee had abandoned his land, and he alone could direct that it be offered for public sale. *Minter v. Crommelin*, 18 How. 87.

6. A patent for such land carries a presumption of abandonment and a consequent order from the secretary. *Ib.*

7. Under the acts of March 3, 1819, and May 8, 1822 (3 Sts. 528, 707), the register and receiver of the land office had a right to direct on what land a confirmation under the act of April 25, 1812 (2 Sts. 713), should be located. *Cousin v. Labatut*, 19 How. 202.

8. If the register and receiver of a land office receive money for land and issue the usual patent certificate, but, in reporting to the general land office, mistake the Christian name of the purchaser, a patent issued in the wrong name may be recalled, and a new one in the proper name may be issued instead thereof. *Bell v. Hearne*, 19 How. 252.

**LANDS OF UNITED STATES — LAND OFFICE**  
— continued.

9. If the land commissioner inadvertently issue a patent to a wrong person, he may cancel it. *Doswell v. De la Lanza*, 20 How. 29.

10. The authority to select and lay off school lands, under the act of March 18, 1818 (3 Sts. 409), was not in the register of the land office, but in the secretary of the treasury. *Dickins v. Mahana*, 21 How. 276.

11. The commissioner of the land office has power to determine upon the correctness of a survey under a confirmed Spanish claim to land in the upper Louisiana country. *Magwire v. Tyler*, 1 Black, 195.

12. The secretary of the interior having general supervision of matters relating to the general land office, has power on appeal from such a decision to order the survey to be set aside and a new one to be made preliminary to the issuing of the patent. *Ib.*

13. The commissioner of the general land office has power to vacate an entry allowed on false and fraudulent proofs of settlement. *Harkness v. Underhill*, 1 Black, 316.

14. Under the statute providing that proof of settlement and improvement shall be made to the satisfaction of the register and receiver of the land district, these officers are not required to sit at the same time and concurrently pass on the sufficiency of the proof. *Potter v. United States*, 107 U. S. 126.

15. After a patent has once issued, the officers of the land department having acted within the scope of their authority, their functions cease. The patent cannot be recalled, nor has the department any further control over the land. Whatever remedies exist in favor of one to whom the patent should have issued must be sought in a court of equity. *Moore v. Robbins*, 96 U. S. 530.

16. Where, however, a patent has not issued, the secretary of the interior may review the decision of the land commissioner, and the decision of the secretary, finally rendered, concludes the department. *Ib.*

17. After a patent has been executed by the president and recorded in the general land office, all power of the executive department over it ceases, and the land-office commissioner cannot, by mutilating it, affect its validity. *Bicknell v. Comstock*, 113 U. S. 149.

18. While no act of congress expressly authorizes the secretary of the interior or other officer of the land department to appoint timber agents, the appropriation of money by congress to pay them is a recognition of the validity of their appointment. *Wells v. Nickles*, 104 U. S. 444.

19. A surveyor of public land appointed under the act of April 29, 1816 (3 Sts. 325), is a disbursing officer, and under the act of May 7, 1822 (3 Sts. 697), is required to give security. *Farrar v. United States*, 5 Pet. 373.

**LANDS OF UNITED STATES — LAND OFFICE**  
— continued.

20. The act of the register in issuing a warrant under an assignment of a certificate of a military right, held to be ministerial, not judicial. *Brush v. Ware*, 15 Pet. 93.

21. If a receiver purchase public lands, and do not pay over the money, but falsely enter the amount of the sale in the account rendered to the government, as though actually paid to him in the ordinary manner, for a sale to a third person, there is a breach of official duty, under the act of April 24, 1820, § 2 (3 Sts. 566), forbidding credit on sales of such lands, for which he is immediately liable, so that his sureties in a bond subsequently given are not liable therefor. *United States v. Boyd*, 5 How. 29.

22. — *Their Acts, when reviewed and how controlled.*] The courts cannot exercise a direct appellate jurisdiction over the rulings of the officers of the land department, nor reverse or correct them in a suit between private parties. *Quinby v. Conlan*, 104 U. S. 420.

23. It is only where those officers have misconstrued the law, or where their judgment has been affected by misrepresentation and fraud, that, in a proper proceeding, the courts can interfere and refuse to give effect to their action. *Ib.*

24. And the misconstruction of law must be clearly manifest. And if fraud and misrepresentation are relied on, specific allegations must be made. *Ib.*

25. The decision of the register and receiver under the act of May 29, 1830 (4 Sts. 420), as to the validity and extent of a pre-emption right, can be impeached only for fraud. *Lytle v. Arkansas*, 9 How. 314.

26. Since the passage of the act of July 4, 1836 (5 Sts. 107), giving the commissioner of the general land office supervision of their acts, the decision of the register and receiver on a pre-emption claim is not conclusive. *Barnard v. Ashley*, 18 How. 43.

27. An adjudication of the register and receiver authorizing an entry is subject to revision in the courts on proof that the entry was obtained by fraud. *Lytle v. Arkansas*, 22 How. 193.

28. A decision of the register and receiver in favor of a pre-emptor, with the issue of a certificate and of a patent thereon, is not conclusive against a state claiming the land as reserved for school purposes, on a question of fraud on the part of the pre-emptor in making the entry. *Minnesota v. Bachelder*, 1 Wal. 109.

29. A decision of the commissioner of the land office setting aside, without notice, an entry made on proof of claim and due payment of money, and permitting the land to be sold, and a patent to be issued to another, is not conclusive in equity against the rights of the original enterer. *Lindsey v. Hawes*, 2 Black, 554.

30. Section 10 of the act of June 12, 1858 (11 Sts. 326), which provides that the decision of the commissioner of the land office on appeals

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— continued.

in contests between pre-emptors shall be final, unless appeal is taken to the secretary of the interior, was not intended to give the action of the department any more conclusive effect than it had without it. [CLIFFORD, J., dissenting.] *Johnson v. Towsley*, 13 Wal. 72.

31. And without it, although where the law has confided to a special tribunal authority to hear and determine certain matters, its decision is, in general, conclusive, a decision of the department does not oust the courts of equity of their ordinary jurisdiction, whether in matters of trust or in matters of fraud or mistake. *Ib.*

32. So of § 5, act of March 3, 1877 (19 Sts. 377), providing for a commission to settle the rights of claimants and occupants on the Arkansas Hot Springs reservation, which provides that the commissioners shall "finally determine the right of each claimant or occupant," so far as relates to an award to claimants of the right of pre-emption. A court of equity may inquire whether the legal title under a patent issued pursuant to their determination is not subject to a trust in favor of another. [WAITE, C. J., and HARLAN, WOODS, and BLATCHFORD, JJ., dissenting, holding the case to be distinguished in that the commission is a special tribunal created for a special purpose, with duties of a judicial character, and that a claimant appearing before them is bound.] *Rector v. Gibbon*, 111 U. S. 276.

33. For mere errors of judgment on the part of officers of the land department as to the weight of evidence of settlement in contested pre-emption cases, the only remedy is by appeal from officer to officer, or perhaps, in special cases, to the president. *Shepley v. Cowan*, 91 U. S. 330.

34. The granting of a patent for land, where proof, hearing, and decision are required, and the exercise of discretion and judgment is necessary, is not a matter concerning which the action of the department of the interior is subject to review by the supreme court of the District of Columbia. *Brouning v. McGarrahan*, 9 Wal. 298.

35. The decision of the officers of the land department on controverted questions of fact arising on an application for a patent to public land is conclusive, in the absence of fraud or mistake, subject, however, to the right of the courts to charge the patentee as a trustee for another, in a proper case. *Warren v. Van Brunt*, 19 Wal. 646.

36. The decision of the officials of the land department, determining, as a matter of fact, that an applicant for a patent to public lands has previously exercised his pre-emptive right, is conclusive, and will not be reviewed by the courts. *Baldwin v. Stark*, 107 U. S. 463.

37. Under the act of March 3, 1811 (2 Sts. 662), a division, by the principal deputy surveyor, under direction of the surveyor-general, between proprietors of contiguous lands on a

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— continued.

stream in Louisiana, of back-lands to which they were entitled by pre-emption under that act, but of which they could not obtain each his full quantity, was final and conclusive of their respective rights, if unappealed from, and cannot be disturbed by any court. *Haydel v. Dufresne*, 17 How. 23.

38. There is nothing in the act of March 5, 1872 (17 Sts. 37), directing the commissioner of the land office to receive and examine selections of swamp and overflowed lands in Iowa, and to allow or disallow the same, which implies a denial of the right of appeal, as in analogous cases, to the secretary of the interior. *Buena Vista County v. Iowa Falls & Sioux City Railroad Co.*, 112 U. S. 165.

39. The court will not interfere to restrain the cancellation, by the secretary of the interior and the commissioner of the land office, of an entry of land for invalidity under certain acts of congress. *Gaines v. Thompson*, 7 Wal. 347.

40. Nor to restrain a register and a receiver of a local land office from acting on an application to prove a pre-emption of lands of which the complainant claims to be the legal owner. *Litchfield v. Richards*, 9 Wal. 575.

41. By contesting the jurisdiction of the land office, one does not waive the right to make objections to his adversary's case, on its merits, when the matter reaches the courts. *Buena Vista County v. Iowa Falls & Sioux City Railroad Co.*, 112 U. S. 165.

42. To a proceeding to restrain a register and receiver of a local land office from acting on an application to prove a pre-emption of lands of which the complainant claims to be the legal owner, if sustainable, the pre-emptor would be a necessary party. *Litchfield v. Richards*, 9 Wal. 575.

43. The proviso in the act of March 22, 1852 (10 Sts. 3), that no register or receiver shall receive a compensation greater than that allowed by law, is prospective, and is not affected by a subsequent allowance of fees for specific services. The subsequent acts, therefore, allowing fees for locating military land warrants do not authorize those officers to retain or receive more than three thousand dollars in any one year. *United States v. Babbitt*, 1 Black, 55.

44. A receiver of public money for a land district may not retain from military bounty land fees received by him during his term of office, more than enough, with his commissions on land sales, to make up his salary of two thousand five hundred dollars. *United States v. Brindle*, 110 U. S. 658.

45. But under the acts of February 11, 1847, September 28, 1850 (9 Sts. 125, 520), March 22, 1852, and March 3, 1855 (10 Sts. 3, 635), the register was bound to receive such fees. *United States v. Babbitt*, 95 U. S. 334.

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— continued.

46. And his refusal to pay over such part thereof as was in excess of the maximum compensation allowed by law was a breach of his official bond both as to himself and his sureties. *Ib.*

47. — *Records, etc. of the Land Office — What a Part and of what, Evidence.*] A memorandum in the margin of a record of a patent in the general land office, stating that the patent was for land other than that described in the record, is no part of the record, and cannot be proved to contradict it, it not being known who made the memorandum, nor on what evidence it was made, and it not being the record of any act of the department. *Branson v. Wirth*, 17 Wal. 32.

48. The record at the general land office of a patent is evidence of the same dignity and subject to the same defences as the patent itself. *McGarahan v. New Idria Mining Co.*, 96 U. S. 316.

49. Where, in proof of a grant of land from the United States, the record of the patent is relied on, it must show a patent countersigned by the recorder of the general land office, or it is insufficient to prove title. Nor does the act of March 3, 1843 (5 Sts. 627), in relation to exemplifications of records, affect the case. *Ib.*

50. The map in the office of the recorder of land titles in St. Louis known as Choteau's map is not conclusive on a question of the extent of lots in that town, but is evidence for the jury. *St. Louis Schools v. Risley*, 10 Wal. 91.

*Commissioner — Error in setting aside Certificate of Entry, etc., cognizable, in general, only in Equity.*

See EJECTMENT — IN GENERAL, 30.

*Commissioner — Mandamus to compel him or Secretary of Interior to issue Patent — Not issued.*

See MANDAMUS, 16, 17.

*Commissioner — Power to decide on Claims to Lands, etc.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 100.

*Officer — Misconduct — Effect on Pre-emption Claim.*

See LANDS OF UNITED STATES — PRE-EMPTION, 54.

*Officers' Decisions — When set aside or reviewed.*

See LANDS OF UNITED STATES — CONFLICTING CLAIMS, 66, 67.

*Officers' Duties, etc., in Issue, etc., of Patent.*

See LANDS OF UNITED STATES — PATENT.

*Receiver of Public Money in a Land District — Liability.*

See RECEIVER OF PUBLIC MONEY, 13.

**LANDS OF UNITED STATES — LEGISLATIVE GRANTS** — *In general — Construction, etc.*

See pl. 1-8.

*School Purposes — Grants therefor, in general.*

See pl. 9-27.

*Aid to Railroads — Grants therefor — When Title passes — Conditions — Construction of Particular Grants, etc.*

See pl. 28-72.

*Swamp-land Grants — Effect of Grant — Application of Proceeds.*

See pl. 73-80.

*Oregon Donation Grant — When and on what Condition it takes Effect — To whom it inures.*

See pl. 81-87.

*Relief of Inhabitants of Towns on Public Lands.*

See pl. 88-92.

*Improvement of Des Moines River — Other Internal Improvements — Various Purposes.*

See pl. 93-115.

1. *In general — Construction, etc.*] A grant may be made by a statute as well as by a patent pursuant to a statute; and a confirmation by a statute is a grant to all intents and purposes. *Strother v. Lucas*, 12 Pet. 410.

2. The titles of settlers on public lands may be confirmed by an officer duly authorized by act of congress, by an instrument in writing without seal. *Reichart v. Felps*, 6 Wal. 160.

3. Where a statute operates as a grant of public property to an individual or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual. Nothing can be inferred against the state. *Shedd v. Grandjean*, 111 U. S. 412.

4. Where a statute granting land contains no clause restraining the operation of words of present grant, those words, unlike such words in a grant by a person of lands to be afterwards designated, where the grant is to be deemed but a contract to convey, must be deemed to import an immediate transfer of title, although subsequent proceedings may be required to give precision to the title, and to attach it to specific tracts. A legislative grant operates as a law as well as a transfer of property, and has such force as there was intent to give. *Schulenberg v. Harriman*, 21 Wal. 44.

5. This rule was applied to a grant of public lands to a state in aid of the construction of a railroad, to revert if the road should not be completed within a certain time, — although the route of the road was not designated, and the title did not attach to any particular land. *Ib.*

6. A statute providing that a certain quantity of land "shall be allotted for and given to" one for his public services, is a present general grant,

**LANDS OF UNITED STATES — LEGISLATIVE GRANTS — continued.**

which, on allotment and survey of such a quantity by commissioners appointed by the same statute for such purpose, will be a particular grant of the tract surveyed. *Rutherford v. Greene*, 2 Wheat. 196.

7. The words, "there be and is hereby granted," import, in a grant of public land, a grant *in presenti*; and this, although a survey and location are necessary to give precision to the grant, and to attach it to a particular tract. *Leavenworth, Lawrence, & Galveston Railroad Co. v. United States*, 92 U. S. 733; *Missouri, Kansas, & Texas Railway Co. v. United States*, Id. 760.

8. The surrounding circumstances considered, and allowed to give a construction to an act of congress making a grant of land. *Lessieur v. Price*, 12 How. 59.

9. — *School Purposes — Grants therefor, in general.* All title to the out-lots and common field-lots, etc., in Missouri, reserved for school purposes, by the act of June 13, 1812 (2 Sts. 748), passed from the United States under that act and the acts of May 26, 1824, and January 27, 1831 (4 Sts. 65, 435), when duly designated by the surveyor-general, pursuant to the act of 1824. *Kissell v. St. Louis Public Schools*, 18 How. 19.

10. The surveyor's certificate designating such lots is record evidence of title, and conclusive between the parties. *Ib.*

11. It was the intention of § 6, act of March 6, 1820 (3 Sts. 547), under which the state of Missouri was organized, to grant to the state, for school purposes, every sixteenth section of land not otherwise disposed of, to which the United States had a good title. *Ham v. Missouri*, 18 How. 126.

12. The confirmation by the act of May 24, 1828 (4 Sts. 298), of a claim which had been rejected before the passage of the act of 1820, did not defeat the title of the state, under the act of 1820, to a sixteenth section covered by such claim, such confirmation purporting to be only a relinquishment of such title as the United States then had. *Ib.*

13. Section 10, act of March 3, 1811 (2 Sts. 665), with the proviso thereto, did not hinder the United States from making such grant. *Ib.*

14. The act of 1831 relinquished to Missouri the lots, etc., reserved for the use of schools by the act of 1812, and nothing else; and the latter act excluded from the reservation all lots rightfully claimed by private persons; and a report of the commissioners under the act of July 9, 1832 (4 Sts. 565), in favor of such a claim, and its confirmation by congress, are evidence that it was rightful, and it makes no difference that the claim was barred by the limitation of the act of 1824, that limitation not affecting the rightfulness of the claim, but being merely a declaration that after a certain time the government will

**LANDS OF UNITED STATES — LEGISLATIVE GRANTS — continued.**

not hear the claimant assert it. *St. Louis Public Schools v. Walker*, 9 Wal. 282.

15. Under the act of 1820, and the act of March 3, 1823 (3 Sts. 787), providing for a grant to the state of the sixteenth section in each township in Missouri, for the use of schools, or, such section being previously disposed of, a grant of land equivalent thereto, to be selected by the register and receiver of the proper land district, the title in the substituted land vested in the state when the selection was made and entered in the register's book; and subsequent loss of the record will not affect the title, the selection and entry being proved by proper secondary evidence. *Hedrick v. Hughes*, 15 Wal. 123.

16. The act authorizing Michigan to organize as a state, like other similar acts, granted the sixteenth section of every township to the state, for school purposes. *Cooper v. Roberts*, 18 How. 173.

17. Where the state accepted that act, the grant became a contract or compact between the state and the United States. *Ib.*

18. The title of the state to those sections became complete when the government extended its surveys so that their location became ascertained. *Ib.*

19. The title of the state to one of those sections was not intended to be, and was not, impaired by a lease by the government for mining purposes, nor by the acts of March 1, 1847, and September 26, 1850 (9 Sts. 146, 472). *Ib.*

20. It was an unalterable condition of the admission of Wisconsin into the Union, that, of the public lands in the state, all sixteenth sections not already sold or otherwise disposed of should be granted to the state for the use of schools; and that a section was then in the occupancy of the Menomonee Indians, only postponed the time when the state might take possession. A patent, therefore, of a part of such a section, issued afterwards by the United States to another, conferred no title as against one claiming under a patent from the state; nor has the act of February 6, 1871 (16 Sts. 404), authorizing a sale of lands occupied by the Stockbridge and Munsee tribes any bearing on the question, as it cannot be supposed that congress intended to authorize a sale of land previously disposed of. *Beecher v. Wetherby*, 95 U. S. 517.

21. The land in the Vincennes land district in the Indiana territory, reserved for the use of a seminary of learning, under the act of March 26, 1804, § 5 (2 Sts. 279), and duly selected by the secretary of the treasury, vested in the seminary on its incorporation by the territorial legislature, and not in the state on the admission of the territory into the Union. *Vincennes University v. Indiana*, 14 How. 268.

22. The grant of all sixteenth and thirty-sixth sections of public lands in California to the state for school purposes, made by the act of

**LANDS OF UNITED STATES — LEGISLATIVE GRANTS — continued.**

March 3, 1853 (10 Sts. 244), was not intended to embrace mineral lands. *Ioanhoe Mining Co. v. Keystone Consolidated Mining Co.*, 103 U. S. 167.

23. Under section 7 of that act, if at the time these sections are ascertained by the government survey there be, by the erection of a dwelling-house, or by cultivation, a settlement on any portion thereof, on which some one resides who asserts a claim thereto, no title to such portion, but the alternative right to other land as indemnity, vests in the state. *Ib.*

24. Notwithstanding the use of words in the act of March 21, 1864 (13 Sts. 30), importing an absolute present grant to the state of Nevada of sixteenth and thirty-sixth sections for the support of schools, or of other lands as an equivalent "where such sections have been sold or otherwise disposed of," the grant may be construed to except mineral lands granted afterwards by virtue of the subsequent act regulating grants of mineral lands, the sections not having been surveyed at the time of the passage of the act of 1864. *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U. S. 634.

25. This construction of the act of 1864 is strengthened by the fact that the Nevada statute of February 13, 1867, ratified it. *Ib.*

26. An act declaring that certain sections of land in a territory, when surveyed, shall be and are reserved for school purposes, does not amount to such a dedication thereof, that congress, with the assent of the territorial legislature, may not afterwards bring them within the terms of the law of pre-emption. *Minnesota v. Bachelder*, 1 Wal. 109.

27. Whether lands have been selected by the secretary of the treasury, under a reservation for school purposes, is a question of fact for the jury, and is not to be disposed of by the court as a presumption of law from the fact that the word "school" is written on the plat thereof in the register's office. *Dickins v. Mahana*, 21 How. 276.

28. — *Aid to Railroads — Grants therefor — When Title passes — Conditions.* Where land is granted to aid in building a railroad, and the terms of the grant are *in presenti*, the title passes, and conditions imposed as to the completion of the road are conditions subsequent, not conditions precedent. *Iowa Railroad Land Co. v. Courtright*, 21 Wal. 310.

29. While a grant of alternate sections of public land to a railroad company, although in terms *in presenti*, may be limited to land unoccupied at the time of the location of the road, a grant of the right of way through the public lands without exception or reservation will attach to land acquired by a third person after the grant and before the location of the road. [WAITE, C. J., dissenting.] *St. Joseph & Denver City Railroad Co. v. Baldwin*, 103 U. S. 426.

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30. Although a public grant conveying a present beneficial interest is irrevocable, a grant of lands to a state or territory in aid of the construction of a railroad, with a proviso "that no title shall vest" until a certain part of the road shall be finished through the land granted, may be repealed before any road is built, there being no grant *in presenti*; and with the repeal fall all claims of the grantee or any one claiming under it. [WAYNE and NELSON, JJ., dissenting.] *Rice v. Minnesota & Northwestern Railroad Co.*, 1 Black, 358.

31. In a congressional grant of lands to a railroad corporation, the language "that there be and is hereby granted" imports a grant *in presenti* and not one *in futuro*, or the promise of a grant, although the route of the road, to aid in the construction of which the act is passed, is to be afterwards designated, and, until designated, the title cannot attach to any specific tracts; and when, on the establishment of the route, the location becomes certain, the title acquires precision and attaches to the lands. Such is the rule applicable to the act of July 1, 1862 (12 Sts. 489), granting lands in aid of the Kansas Pacific Railway Company, as amended by the act of July 2, 1864 (13 Sts. 356). *Missouri, Kansas, & Texas Railway Co. v. Kansas Pacific Railway Co.*, 97 U. S. 491.

32. A provision in a congressional grant of land to a state in aid of the construction of a railroad, that, if the road be not completed within a specified time, that part of the land remaining unsold shall revert to the United States, is equivalent to the imposition of a condition subsequent, and the rules applicable to conditions subsequent in the case of private grants apply thereto. *Schulenberg v. Harriman*, 21 Wal. 44; *Farnsworth v. Minnesota & Pacific Railroad Co.*, 92 U. S. 49.

33. Where a grant of land and connected franchises is made to a corporation for the construction of a railroad by a statute which provides for their forfeiture on failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act without judicial proceedings to ascertain and determine the failure of the grantee. Any public assertion by legislative act of the ownership of the state after the default of the grantee — such as an act resuming control of the road and franchises, and appropriating them to particular uses, or granting them to another corporation to perform the work — is equally effective and operative. *Farnsworth v. Minnesota & Pacific Railroad Co.*, 92 U. S. 49.

34. The rights of contesting corporations to disputed tracts are determined by the dates of their respective grants, and not by the dates of the location of the routes of their respective roads. *Missouri, Kansas, & Texas Railway Co. v. Kansas Pacific Railway Co.*, 97 U. S. 491.

35. Where several railroad companies claim

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land under the same act of congress, no priority of title can be based on a priority of location, if the later location is within the time limited by the act. The titles which, by the location, become perfected, relate back to the time of the grant. Where the lines overlap, the lands which otherwise would be claimed by each of two companies, are theirs in undivided moieties. *St. Paul & Sioux City Railroad Co. v. Winona & St. Peter Railroad Co.*, 112 U. S. 720.

36. With regard to "lieu lands," the rule is otherwise. Where the land-grant act speaks, as do most of them, of lands to be selected, priority of selection gives priority of title. *Ib.*

37. Where an act making a large grant of public land along the line of a projected railroad in aid of the construction thereof is amended, before any part of the road is built, by an act extending the limits of the grant on either side of the line, and providing "that before any land granted by this act shall be conveyed to any company or party entitled thereto under this act," the cost of surveying, etc., shall be paid, the sums paid to be used to prosecute the survey of public lands along the line, such provision of the latter act will be deemed to apply to all lands granted by either act. *Kansas Pacific Railway Co. v. Prescott*, 16 Wal. 603.

38. An act granting lands to a state to aid in the construction of a railroad, and declaring that a quantity of land, not exceeding one hundred and twenty sections, and "included within a continuous length of twenty miles" of the road, may be sold, and that, after the governor shall have certified that any continuous twenty miles of the road are completed, another like quantity may be sold, and so from time to time until the completion of the road, authorizes a sale of one hundred and twenty sections anywhere along the line of the road in advance of the construction of any part of the road. *Iowa Railroad Land Co. v. Courtright*, 21 Wal. 310.

39. A provision in an act granting lands to aid in the construction of a railroad, that "said railroad shall be, and remain, a public highway for the use of the government," free from all toll or other charge, for the transportation of any property or troops of the government, secures to the government the free use of the road, but not of the company's rolling-stock. [CLIFFORD, SWAYNE, MILLER, and DAVIS, JJ., dissenting.] *Lake Superior & Mississippi Railroad Co. v. United States*, 93 U. S. 442; *Atchison, Topeka, & Santa Fé Railroad Co. v. United States*, *Id.*

40. A requirement that a railroad company in aid of which land is granted shall file a map in the department of the interior designating the general route of the road, is complied with by filing the map in the general land office, although it is not filed in the office of the register and receiver until later. *Kansas Pacific Railway Co. v. Dunmeyer*, 113 U. S. 629.

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41. The route of a railroad is "definitely fixed," within the meaning of that term, as used generally in the land-grant acts, where a map, designating the route, is filed with and approved by the secretary of the interior. *Walden v. Knevals*, 114 U. S. 373. It is not necessary that the lands should be first withdrawn from market. *Van Wyck v. Knevals*, 106 U. S. 360.

42. The route is definitely fixed when the map is filed in the office of the commissioner of the general land office. *Kansas Pacific Railway Co. v. Dunmeyer*, 113 U. S. 629.

43. An individual, therefore, who, after the filing of the map, enters on lands covered by the grant, and obtains a patent, takes no title as against the railroad company. *Ib.*

44. He cannot avail himself of the company's failure to complete its road. *Ib.*

45. Nor of the fact that the route was changed after the map was filed, the land claimed by him being within the prescribed distance from the line as shown by the map and from the line of the road as built. *Ib.*

46. Where acts granting lands in aid of a railroad provide for the selection of other lands than the alternate sections first granted, in case, when the lines of the road are definitely fixed, it shall appear that the government has sold any of the sections, and require the secretary of the interior to reserve such other lands where the lines shall have been established and a map definitely showing them shall have been filed, the duty of the secretary in the premises does not arise until the filing of a map definitely showing the whole line, not a part of it merely; and the railroad company can base no claim on a selection made before the filing of the map, as against a purchaser from the government. *Cedar Rapids & Missouri River Railroad Co. v. Herring*, 110 U. S. 27.

47. — *Aid to Railroads — Construction of Particular Grants, etc.* A grant of alternate sections of public lands for a railroad which provides for giving other lands in lieu of those disposed of within the sections granted, may be construed to provide for indemnity for lands disposed of before the date of the grant as well as after, although words importing a present grant are used. *Winona & St. Peter Railroad Co. v. Barney*, 113 U. S. 618.

48. The use of the term "quantity of lands granted," in an act enlarging a grant for a railroad from six to ten alternate sections, does not change the grant from one of lands in place to one of quantity, it being apparent that the words were used in the sense of "six sections." *Ib.*

49. A provision in the enlarging grant that lands within the limits of the extension which have been granted for aiding other railroads shall be deducted "from the full quantity of lands hereby granted," means nothing that would not, in its absence, have been implied. The words "the full quantity granted" denote the exten-



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sion, which must be reduced to the extent of previous grants. *Ib.*

50. An act increasing the quantity of land granted by an earlier act in aid of a railroad company, and containing language inserted in abundance of caution to protect rights existing, is not to be so construed as to repeal the fundamental clause of the earlier act, or to narrow exceptions therein made. *Kansas Pacific Railway Co. v. Dunmeyer*, 113 U. S. 629.

51. Where an act grants land in aid of a railroad within certain limits and in certain quantities "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed," the company acquires no rights in land to which a homestead claim attaches but which is abandoned afterwards. *Ib.*

52. The grant of land made by the act of July 2, 1864 (13 Sts. 356), amending the act of July 1, 1862 (12 Sts. 489), to aid in the construction of a railroad, etc., from the Missouri River to the Pacific Ocean, was one of quantity, and without lateral limits. The grant was to aid in the construction of the entire road, and not merely of a portion of it; and it was intended that land should be taken where it could be found along the general direction or course of the road, and without reference to any particular section of twenty miles. Nor was the company required to apply for its land as it completed each section. And while the land department had no right to enlarge the quantity on one side of the road to make up a deficiency on the other, yet if patents were so issued, they cannot be adjudged invalid as to any land not identified, so as to be capable of being separated from that properly granted. *United States v. Burlington & Missouri River Railroad Co.*, 98 U. S. 334.

53. Although no lateral limit was prescribed, the implication was that the land should be taken as near the road as possible. Where, therefore, after the location of the road, alternate sections within a twenty-mile limit were withdrawn from sale, and the parts not previously disposed of appropriated to the satisfaction of the grant, lands embraced within the boundaries of those thus withdrawn were not afterwards open to pre-emption. *Wood v. Burlington & Missouri River Railroad Co.*, 104 U. S. 329.

54. Where an act, like that of 1862, grants lands to a railroad company for the purpose of aiding in the construction of its road, and provides that all lands so granted which "shall not be sold or disposed of" by the company within a certain time after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a certain price to be paid to the company, — the company may mortgage the lands in fee for the purpose of raising money to complete the road. Such provisions

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should be so construed as to effect their primary object of aiding in the construction of the road, and the words "or disposed of" contemplating such a use. [CLIFFORD, MILLER, and BRADLEY, JJ., dissenting.] *Platt v. Union Pacific Railroad Co.*, 99 U. S. 48.

55. Lands within the limits of an alleged Mexican grant, *sub judice* under the act of March 3, 1851 (9 Sts. 631), for the settlement of private land claims in California, where the secretary of the interior ordered a withdrawal from sale, etc., of lands along the route of the Western Pacific Railroad, were not public lands within the meaning of the act of 1862 and the amendatory act of 1864, granting alternate sections of public land along that road in aid of its construction, and hence could not pass to the company under those acts. [FIELD and STRONG, JJ., dissenting.] *Newhall v. Sanger*, 92 U. S. 761.

56. Where, however, a claim under a Mexican grant is no longer *sub judice*, — the grant having been declared invalid, land embraced therein may be selected by a railroad company under an act which, like the act of July 25, 1866 (14 Sts. 239), granting lands to the California & Oregon Railroad Company, provides for the selection of lands in lieu of those embraced in alternate sections first designated, but found to be occupied or otherwise disposed of. *Ryan v. Central Pacific Railroad Co.*, 99 U. S. 382.

57. A railroad company is not to be excluded from the rights given by the act of March 3, 1875 (18 Sts. 482), which authorizes any railroad company duly organized under the law of any state or territory to use a defile, cañon, or pass on the public land, notwithstanding prior occupancy by another road, merely because its movements are controlled by or conducted in the interest of another company. *Denver & Rio Grande Railway Co. v. Alling*; *Denver & Rio Grande Railway Co. v. Cañon City & San Juan Railway Co.*, 99 U. S. 463.

58. Upon the question of which of two railroad companies acquired paramount rights in such a cañon, one company having made a preliminary survey through it, and constructed portions and branches of its road on either side of it, and not having at any time abandoned its intention ultimately to occupy it, although between the time of the survey and the actual occupancy of a part of it with the intention of beginning construction, six years had elapsed, and the other company having, on the day of such occupancy, taken possession of it with a large force of men, and begun and continued work, it was held that the former company had the better and prior right. [WAITE, C. J., dissenting.] *Ib.*

59. The proviso in the act of May 15, 1856 (11 Sts. 9), granting land to Iowa to aid in the construction of railroads, which excluded from the grant all lands theretofore "reserved by any act of congress, or in any manner, by competent

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authority, for the purpose of aiding in any object of internal improvement, or for any purpose whatever," excluded swamp lands granted to the state by the act of September 28, 1850 (9 Sts. 519), those lands being so reserved. *Burlington & Missouri River Railroad Co. v. Fremont County*, 9 Wal. 89.

60. The title to lands granted to the state by the act of 1856 vested as the roads were located; and it was not divested by a change of location authorized by a subsequent act, no lands being in fact accepted or received under the later act; and were it otherwise, the title could not be disputed by settlers, but only by the government. [BRADLEY, J., dissenting.] *Grinnell v. Chicago, Rock Island, & Pacific Railroad Co.*, 103 U. S. 739.

61. Swamp lands in Missouri did not pass by the act of June 10, 1852 (10 Sts. 8), granting land to the state in aid of the construction of railroads, the act excepting lands reserved by any act of congress or otherwise, and those lands having passed to the state under the swamp-land act of September 28, 1850 (9 Sts. 519). *Hannibal & St. Joseph Railroad Co. v. Smith*, 9 Wal. 95.

62. Where one sues for land which he claims under the act of 1852, it is competent to prove by witnesses who know the land that it is swamp land, and so within the act of 1850, although under that act it was the duty of the secretary of the interior to identify such lands and furnish the state with a list thereof, that duty not having been performed. [CLIFFORD, J., dissenting.] *Ib.* See *French v. Fyan*, 93 U. S. 169.

63. The location of lands granted to Missouri by the act of 1852 was not fixed, within the meaning of that act and of the state statute accepting the grant, by mere location of the road, nor until the railroad company caused a map of the road to be recorded in accordance with that statute. *Baker v. Gee*, 1 Wal. 333.

64. Under the act of March 3, 1863 (12 Sts. 772), granting to Kansas, in aid of railroads, alternate sections of land on each side of the proposed roads, and providing that if, where the lines of the roads should be definitely fixed, it should appear that the United States had sold or reserved for any purpose any part of such lands, other lands should be selected in the stead of those thus sold, reserved, or "otherwise appropriated," a withdrawal, by the land office, of land along the "probable line" of one of these roads, before the line was definitely fixed, was held not to affect the rights in such land of a railroad company, which, but for such withdrawal, could claim title thereto by virtue of a compliance with the provisions of the acts relating to the Pacific Railroad. *Kansas Pacific Railroad Co. v. Atchison, Topeka, & Santa Fé Railroad Co.*, 112 U. S. 414.

65. There is nothing in the act of June 2, 1864 (13 Sts. 95), granting lands in Iowa to the Cedar Rapids & Missouri River Railroad Com-

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pany, which indicates a departure from the rule governing railroad land grants generally, that the quantity of land is to be measured by the length of road constructed, without regard to the length located. *Cedar Rapids & Missouri River Railroad Co. v. Herring*, 110 U. S. 27.

66. Where an act grants to a railway company a right of way through the public land, and through a certain narrow cañon thereon, and before the cañon is occupied a general act is passed giving to any railroad company the right to occupy any cañon or pass notwithstanding prior occupancy by another company, and afterwards the time within which, by the granting act, the company was required to complete its road is extended, and the company accepts the benefits conferred by the act so extending the time, and takes possession of the cañon by virtue of the right that this act confers, it must share its occupancy with another company claiming the right of occupancy under the general act. *Denver & Rio Grande Railway Co. v. Alling*; *Denver & Rio Grande Railway Co. v. Cañon City & San Juan Railway Co.*, 99 U. S. 463.

67. An act granting a right of way to a railroad company, as, e. g., the act of June 2, 1872 (17 Sts. 339), may be construed as taking effect, by relation, from the time when the location and appropriation are made, the title, until then, being imperfect, where such construction can be fairly implied from the language of the grant and the circumstances under which it was made. [WAITE, C. J., dissenting, on the ground that here the act conferred a license merely to enter on lands which should be unappropriated at the time of the permanent location of the road.] *Ib.*

68. A grant of public land in aid of a railroad, which reserves all lands already reserved to the United States "for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever," excepts land reserved by treaty for an Indian tribe, through which the granting act gives to the railroad a right of way, and to which the Indian title afterwards is extinguished by a treaty authorized by an act of even date with the granting act, authorizing treaties for the removal of the Indian tribes within the state and the extinction of their titles. [SWAYNE, FIELD, and STRONG, JJ., dissenting.] *Leavenworth, Lawrence, & Galveston Railroad Co. v. United States*, 92 U. S. 733; *Missouri, Kansas, & Texas Railway Co. v. United States*, Id. 760.

69. Nor can the fact that the granting act provides for the selection of other lands in case the alternate sections granted should be taken up or reserved by the United States for other purposes affect the case. *Ib.*

70. Nor the fact that the treaty, while providing for the survey and sale of the land relinquished by the tribe, contained a recital which, while obscure and indefinite, might be construed

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to recognize a grant. [SWAYNE, FIELD, and STRONG, JJ., dissenting.] *Ib.*

71. Nor has a subsequent act, passed for the sole purpose of enabling the company to relocate its road, any bearing on the case, although containing a misrecital, where it expressly leaves the rights of the company to be determined by previous legislation. [SWAYNE, FIELD, and STRONG, JJ., dissenting.] *Ib.*

72. Where congress by resolution granted, subject to the president's approval, a certain fractional section "on the west side" of a military reservation, for the construction of a railroad, provided the usefulness of the reservation for military purposes would not be impaired, it was held, in view of the intent of the resolution and of the determination to be made by the president, that a fractional section within the reservation was intended. *Republican River Bridge Co. v. Kansas Pacific Railway Co.*, 92 U. S. 315.

73. — *Swamp-land Grants — Effect of Grant — Application of Proceeds.* The swamp-land act of September 23, 1850 (9 Sts. 519), conferred a present vested right superior to a right under any subsequent grant, although the lands were afterwards to be identified by the secretary of the interior. [CLIFFORD, J., dissenting.] *Hannibal & St. Joseph Railroad Co. v. Smith*, 9 Wal. 95; *French v. Fyan*, 93 U. S. 169; *Martin v. Marks*, 97 U. S. 345.

74. It operated as a grant *in presenti* to the states then in existence of the swamp lands within their respective limits. *Rice v. Sioux City & St. Paul Railroad Co.*, 110 U. S. 695.

75. But not to a state afterwards admitted to the Union, although the act of admission provided that all the laws of the United States not locally inapplicable should have the same force and effect within that state as in other states of the Union. *Ib.*

76. The neglect of the secretary of the interior to make out and certify lists of such lands to the states, etc., as required by the act, caused the passage of the act of March 3, 1857 (11 Sts. 251), which confirmed selections duly made and reported prior to its passage. Where, on a question of title, it did not appear from the record before the supreme court when the selection relied on was filed in the general land office, it was held that the triers of fact had a right to presume that the state surveyor-general did his duty by forwarding the list before the passage of the act, it having been filed with and approved by him in 1852. *Martin v. Marks*, 97 U. S. 345.

77. The claim of a county to lands as swamp and overflowed lands cannot be sustained, where the claim is based on a list which is itself merely a claim, which has never been recognized, approved, or allowed by any department of the government, and which is shown to be inaccurate and unreliable. *Buena Vista County v. Iowa Falls & Sioux City Railroad Co.*, 112 U. S. 165.

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78. Although the act expresses its purpose to be the reclaiming of the lands, and provides that their proceeds "shall be applied exclusively, as far as necessary," to that purpose, a scheme under which the state, in granting the lands to counties, provides for the diversion of their proceeds to purposes of education, highway improvements, etc., is not to be declared inconsistent with the requirements of the act, it not appearing that any necessity exists for devoting the proceeds to purposes of drainage. *American Emigrant Co. v. Adams County*, 100 U. S. 61.

79. The application by a state of the proceeds cannot be questioned by private parties. The state is accountable only to the United States. *Mills County v. Chicago, Burlington, & Quincy Railroad Co.*, 107 U. S. 557; *Hagar v. Reclamation District*, 111 U. S. 701. And see *American Emigrant Co. v. Adams County*, 100 U. S. 61.

80. Moreover, the appropriation of the proceeds of these lands rests solely in the good faith of the state. Neither a contract nor a trust following the lands was created by the act. *Ib.*

81. — *Oregon Donation Grant — When and on what Condition it takes Effect — To whom it inures.* Under the act of September 27, 1850 (9 Sts. 496), relating to donations of public land to settlers in Oregon, the right of the claimant became perfect when the certificate of the surveyor-general and accompanying proofs were received by the commissioner of the general land office, and he found no valid objection thereto. *Stark v. Starr*, 6 Wal. 402.

82. The language of the act, "that there shall be, and hereby is, granted" land to every settler who, among other things, "shall have resided upon" it for a certain time, imports a future, not a present, grant, although appropriate for a present grant were there a present grantee; and a settler cannot take until the expiration of the prescribed time of residence. *Hall v. Russell*, 101 U. S. 503.

83. And the act providing further that, on the death of any settler before the expiration of the requisite term of residence, his rights shall descend, etc., his heirs, on his death, take no title to the land, but only the right to acquire it from the United States. *Ib.*; *Vance v. Burbank*, 101 U. S. 514.

84. The act of May 20, 1836 (5 Sts. 31), providing that patents issued in the name of a deceased person shall inure to his heirs and assigns, applies to patents issued under the act of 1850, which gives the property of a deceased intestate husband or wife to the survivor and the children or the heirs of the intestate "in equal proportions;" and the two acts must be construed together, and, so construed, they give the land to the surviving children and husband or wife in equal shares. *Davenport v. Lamb*, 13 Wal. 418.

85. Under the act of July 17, 1854 (10 Sts.

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305), amending the act of 1850, a husband and wife, who, by reason of residence and cultivation, were, under the latter act, entitled to a patent, could, before receiving it, sell and convey the land, so as to cut off the rights of his or of her children or heirs, in case of his or her death before its issue. *Barney v. Dolph*, 97 U. S. 652.

86. The term "single man," in section 4 of the act granting lands to "every white settler or occupant, . . . American half-breed Indians included," includes an unmarried woman. *Silver v. Ladd*, 7 Wal. 219.

87. That the labor of cultivating the land as required by the act be not done by the settler in person is unimportant; if it be done by his servants or friends for his benefit and under his claim, it is sufficient. *Ib.*

88. — *Relief of Inhabitants of Towns on Public Lands.*] A patent issued to the corporate authorities of Portland, Oregon, in December, 1860, on an entry under the act of May 23, 1844 (5 Sts. 657), for the relief of citizens of towns located on public lands in certain cases, passed no title to the land covered by the donation claim of a person whose right to a patent was perfected before such entry, and whose claim was surveyed before that act was extended to that territory, as it was, with certain qualifications, by the act of 1854. *Stark v. Starr*, 6 Wal. 402.

89. Under the act of 1844, authorizing the probate judge of the county, in counties where a town has been settled before the land has become subject to entry, to make entry in trust for the settlers, the act of May 28, 1864 (13 Sts. 94), conferring authority in like manner to enter the land on which Denver is located, and the Colorado statute of March 11, 1864, regulating the rights of settlers, etc., in such case, the settler in possession on the passage of the act of 1864 and at the time of entry is the person entitled to conveyance from the trustee. *Coffield v. McClelland*, 16 Wal. 331.

90. But, under that statute, a settler who did not make and deliver to the judge a written statement describing land claimed, within ninety days after publication of notice of the entry, was barred of all right therein. *Ib.*

91. The right of an occupant to land under the act of March 2, 1867 (14 Sts. 541), for the relief of the inhabitants of cities and towns on the public lands, which provides that the lands may be entered in trust for the occupants, and under the Utah statute providing for the execution of trusts arising under that act, was lost where the occupant had abandoned his possession, or had sold his possessory right before the entry was made by the corporate authorities. *Stringfellow v. Cain*, 99 U. S. 610; *Folsom v. Dewey*, 103 U. S. 738.

92. And this may, in some circumstances, defeat the rights of minors in lands occupied before his death by their father, but sold and

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abandoned by their mother and natural guardian, or sold by the administrator. *Ib.*

93. — *Improvement of Des Moines River — Other Internal Improvements — Various Purposes.*] The act of August 8, 1846 (9 Sts. 77), granting to the territory of Iowa, "for the purpose of aiding said territory to improve the navigation of the Des Moines River from its mouth to the Raccoon Fork, so called, in said territory, one equal moiety in alternate sections of the public lands . . . in a strip five miles in width on each side of said river," to be selected by an agent of the territory, subject to the approval of the secretary of the treasury, did not grant lands above the fork; and a patent issued by the state for such lands gave no title, although issued on a contrary construction of the act approved by the secretary. *Dubuque & Pacific Railroad Co. v. Litchfield*, 23 How. 66.

94. The act of May 15, 1856 (11 Sts. 9), granting land to Iowa to aid in the construction of certain railroads, by the proviso that lands theretofore reserved by statute, "or in any other manner by competent authority," to aid in internal improvement, should be reserved from the operation of the act, operated, with the joint resolution of March 2, 1861 (12 Sts. 251), and the act of July 12, 1862 (12 Sts. 543), to reserve and convey to the state, to aid in the improvement of that river, an equal moiety, in alternate sections, of the public lands on or within five miles of that river between the Raccoon Fork and the northern boundary of the state, for the use of those to whom the state had granted, on the assumption that those lands were covered by the grant of 1846. *Walcott v. Des Moines Navigation Co.*, 5 Wal. 681, 689; *Williams v. Baker*, 17 Wal. 144; *Homestead Co. v. Des Moines Valley Railroad Co.*, 17 Wal. 153. See *Wolsey v. Chapman*, 101 U. S. 755.

95. When the act of 1862 took effect as a grant to the state, for the use of its grantees, there was no Indian title to lands above the east fork in the way of the grant. *Dubuque & Sioux City Railroad Co. v. Des Moines Valley Railroad Co.*, 109 U. S. 329.

96. One to whom the state, by the statute of July 14, 1856, conveyed generally only such rights to those lands as it took by the act of that year, was not, therefore, a taker of a title which "proved invalid," within the meaning of that provision of the act of 1862 which directed that other lands be set apart to the state for the use of its grantees whose titles had failed, but a taker, as was the state, of no title at all; and was not entitled, as a *cestui que trust*, to share in the lands so granted as an indemnity. *Homestead Company v. Des Moines Valley Railroad Co.*, 17 Wal. 153; *Crilley v. Burrows*, *Id.* 167.

97. Nor is such a grantee entitled to share in such lands because they were set apart on the theory that the act of 1856 was operative to con-

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vey river lands to the use of the railroads, and did not reserve them for the improvement of the river, and were therefore set apart in sufficient quantity to indemnify for the river lands so conveyed, the state having granted the indemnity lands to a company engaged in building a railroad along the river, and congress, with full knowledge of what the state had done, by the act of March 3, 1871 (16 Sts. 582), having confirmed the title therein to the state and its grantees. *Ib.*

98. Although the alternate sections of land along the Des Moines River above the Raccoon Fork were reserved from sale by the action of the executive department, and so did not pass to the state when selected as school lands under the act of September 4, 1841 (5 Sts. 453), nor as railroad lands under the act of 1856, and were not open to pre-emption, they were not actually given to the state, and hence were not taxable thereby until the joint resolution of 1861 was adopted. *Litchfield v. Webster County*, 101 U. S. 773; *Litchfield v. Hamilton County*, Id. 781.

99. The act of 1841, relative to granting land to certain states for purposes of internal improvement, did not vest the fee in the states; so that in a suit to try the legal title a patent from the United States will prevail over one from a state. *Foley v. Harrison*, 15 How. 433.

100. Under the act of August 3, 1846 (9 Sts. 51), the commissioner of the general land office had power to decide finally on the claims to such lands; and his decision, with a patent thereon, were conclusive of title in the patentee. *Ib.*

101. As, in general, lands which in the execution of an act may fall within grants to others are held to be excluded from sale or pre-emption, the lands claimed by Carondelet, Missouri, as a part of the common lands the title to which was confirmed by the act of June 13, 1812 (2 Sts. 748), were not open to selection by the state as a part of the land granted thereto by the act of 1841 until after ascertainment of the boundary line and the consequent determination against the validity of that claim by the secretary of the interior on February 23, 1855. *Shepley v. Cowan*, 91 U. S. 330.

102. The title of Missouri to the four sections of land granted by the act of March 6, 1820 (3 Sts. 547), with power to the legislature to locate, became complete when the selection was duly made and notice thereof given to the surveyor-general. *Lessieur v. Price*, 12 How. 59.

103. Under the act of June 13, 1812 (2 Sts. 748), confirming titles to village lots, out-lots, and commons in Missouri, while title vested in claimants of private lots which could be identified by possession, the title did not, and could not, vest in claimants of commons which were vague and uncertain as to boundary and location, until the commons were surveyed as the act required. *Carondelet v. St. Louis*, 1 Black, 179.

104. Where such a survey was made for a

**LANDS OF UNITED STATES — LEGISLATIVE GRANTS — continued.**

village, and the town authorities accepted it, and recognized, and acted on it in various ways for many years, the town was held to be concluded in a contest with a neighboring town for more land and a different boundary. *Ib.*

105. The act of 1812 was a grant *in presenti* of all the interest of the United States in the lands therein granted. *Glasgow v. Hortiz*, 1 Black, 595.

106. Although the act provided for a survey of the out-boundaries of common-fields, neither the neglect of the surveyor to make it, nor a mistake in it when made, could defeat the title of the holder of the lot under the act. *Ib.*

107. The act of March 3, 1823 (3 Sts. 786), to confirm claims for lots in Peoria, did not apply to out-lots near the old village, but to those in the new town. *Hall v. Papin*, 24 How. 132.

108. Under that act, no one was entitled to a confirmation of a claim to more than ten acres, or to a confirmation of claims to more than one settled and improved lot. *Ib.*

109. Under an act which, in effect, made valid a void entry of public land, and declared that the title should inure to the benefit of the enterer's grantees, so far as he might have conveyed the same, and a patent issued to the enterer accordingly, it was held, the enterer having conveyed to A., and A. to B., by warranty deeds, and B. to C. by deed of quitclaim, before the passage of the act, that the title inured to the benefit of C., and not to that of D., to whom B. conveyed by warranty deed after the passage of the act, the act having applied the doctrine of relation, and made no distinction between grantees with warranty and those without. *McCarthy v. Mann*, 19 Wal. 20.

110. By a fair construction of the act of July 23, 1866 (14 Sts. 218), confirming selections theretofore made by California of any portion of the public domain, and of the act of March 3, 1853 (10 Sts. 244), the exception in section 1 of the former act of lands "held or claimed under a valid Mexican or Spanish grant" must be determined as of the day when the claimant, under a state selection, undertook to prove up his claim after the surveys had been made and filed, and within the time allowed thereafter to pre-emptors. If at that date the land selected by the state was excluded from such a grant, either by judicial decision or by a survey made by the United States, the claimant may have his claim confirmed. *Huff v. Doyle*, 93 U. S. 558.

111. Section 9, act of July 26, 1866 (14 Sts. 253), "granting the right of way to ditch and canal owners over the public lands," etc., was intended only to confirm to owners of water-rights and of ditches and canals the rights enjoyed by them under local customs, laws, and decisions of the courts prior to the passage of the act, not to confer any absolute right of way over the public domain independent in its enjoyment of such customs, etc. Both that right and

**LANDS OF UNITED STATES — LEGISLATIVE GRANTS — continued.**

the right to the use of the water were intended to be left dependent thereon. *Jennison v. Kirk*, 98 U. S. 453.

112. An agreement whereby A. binds himself, on the location by B. of certain certificates for land in Minnesota, issued under the act of July 17, 1854 (10 Sts. 304), for land in lieu of land held by Sioux half-breeds under the reservation in the treaty of February 24, 1831 (7 Sts. 328), to secure title thereto to be lawfully vested in B., is not in violation either of the act or of the treaty, and may be specifically enforced, although the act protected from location lands already occupied, and the location is made on land occupied by B. That provision of the act was one the benefit of which the occupant might waive. *Myrick v. Thompson*, 99 U. S. 291.

113. The restriction in the act upon the location of such certificates to land on which improvements have been made, applies to unsurveyed lands not reserved by government, not to unoccupied lands subject to pre-emption or private sale. *Ib.*

114. The act of August 14, 1848 (9 Sts. 323), establishing the territorial government of Oregon, which declared that the title to land then occupied as missionary stations should be confirmed and established in the several religious societies to which the stations belonged, gave no title to land the occupancy of which had been abandoned from fear of the Indians in 1847, and not resumed for several years. *Missionary Society v. Dalles*, 107 U. S. 336; *Missionary Society v. Kelly*, *Id.* 347.

115. The exception in the act of May 26, 1824 (4 Sts. 66), granting certain lots to the city of Mobile and to certain persons, of lots of which the local Spanish authorities had made new grants or orders of survey "during the time at which they had the power to grant the same," held to refer to grants made by those authorities after the acquisition of Louisiana by the United States and before the cession of Florida of land lying between the Mississippi and the Perdido, and in dispute between the two governments. [*BARBOUR and CATRON, JJ., dissenting.*] *Pollard v. Kibbe*, 14 Pet. 353. See *Mobile v. Eslava*, 16 Pet. 234; *Mobile v. Hallett*, 16 Pet. 261; *Mobile v. Emanuel*, 1 How. 95; *Pollard v. Files*, 2 How. 591.

*Grants — Conflicting.*

See **LANDS OF UNITED STATES — CONFLICTING CLAIMS.**

*Oregon Donation Grants.*

See **LANDS OF UNITED STATES — CONFLICTING CLAIMS**, 51, 52.

*Schools, etc. — Lands appropriated for Schools, etc., Internal Improvements, etc., not open to Pre-emption.*

See **LANDS OF UNITED STATES — PRE-EMPTION.**

**LANDS OF UNITED STATES — LEGISLATIVE GRANTS — continued.**

*School Lands — Evidence that Lands have been treated as School Lands as Secondary Evidence of Grant.*

See **EVIDENCE — PRIMARY AND SECONDARY**, 19.

*School Purposes — Grants therefor.*

See **LANDS OF UNITED STATES — CONFLICTING CLAIMS**, 60.

**LANDS OF UNITED STATES — MINERAL LANDS.**

— The mineral lands in the land districts, created by the act of June 26, 1834 (4 Sts. 686), held not subject to sale nor liable to pre-emption. [*McLEAN, STORY, and McKINLEY, JJ., dissenting.*] *United States v. Gear*, 3 How. 120.

2. That part of § 9, act of July 26, 1866 (14 Sts. 251), which provided that wherever, by priority of possession, rights to the use of water for mining, agricultural, or other purposes had vested and accrued, and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors of such vested rights should be protected in their enjoyment, and which acknowledged and confirmed for such purposes the right of way for the construction of ditches and canals, was rather a voluntary recognition of a pre-existing right of possession than the establishment of a new one; and the declaration in an earlier railroad grant that earlier lawful claims should not be defeated should be deemed to protect a water and mining company in the use of its canal over such granted lands. *Broder v. Natoma Water & Mining Co.*, 101 U. S. 274.

3. Public land embraced within a town site is open to location and sale for mining purposes in like manner as land elsewhere; its exemption is only from settlement and sale under the pre-emption laws. *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447.

4. One who, as agent, made application for a railroad company for a patent for public lands, knowing that they contained cinnabar, and that it had been mined and reduced there, cannot, after having purchased the lands from the company, successfully defend against a suit instituted by the United States to vacate the patent as embracing mineral lands. *McLaughlin v. United States*, 107 U. S. 526.

5. The digging of lead ore from the public lands is such waste as may be enjoined. *United States v. Gear*, 3 How. 120.

**LANDS OF UNITED STATES — NEW MADRID CERTIFICATES —**

*What Lands subject to Location — When and how acquired — Inception of Title.* The holder of a certificate issued under the act of February 17, 1815 (3 Sts. 211), for the relief of sufferers by earthquake in New Madrid County, Missouri, had a right to locate it only on public lands authorized to be sold. *Stoddard v.*

**LANDS OF UNITED STATES — NEW MADRID CERTIFICATES — continued.**

*Chambers*, 2 How. 284; *Mills v. Stoddard*, 8 How. 345; *Easton v. Salisbury*, 21 How. 426; *Hale v. Gaines*, 22 How. 144.

2. But such a certificate could be located on lands before they were offered at public sale, and, *semble*, before they were surveyed by a public surveyor. [McKINLEY, STORY, and WAYNE, JJ., dissenting.] *Barry v. Gamble*, 3 How. 32.

3. The act of April 26, 1822 (3 Sts. 668), was intended to provide for cases where locations were on lands not surveyed by the government, or where the locations, if surveyed, did not conform to the sectional and quarter-sectional lines of the surveys. *Mackay v. Easton*, 19 Wal. 619.

4. Under that act certificates not located within a year from the date of the act were void. *Easton v. Salisbury*, 21 How. 426; *Hale v. Gaines*, 22 How. 144.

5. And they were given no validity by the act of March 1, 1843 (5 Sts. 603). *Hale v. Gaines*, 22 How. 144.

6. A location under a New Madrid certificate was merely an exchange for the land located, and could not be made without the knowledge of the holder of the New Madrid claim. *Lessieur v. Price*, 12 How. 59.

7. The inception of title to land located under the act of February 7, 1815 (3 Sts. 211), for the relief of sufferers by earthquake in New Madrid County, is the recording of the plat and survey in the recorder's office, the plat and the certificate of survey being the only evidence of location recognized by the government. Until the survey is made, returned, and approved, the locator has no vested interest, and there is no appropriation binding on the government. *Bagnell v. Broderick*, 13 Pet. 436; *Barry v. Gamble*, 3 How. 32; *Lessieur v. Price*, 12 How. 59; *Rector v. Ashley*, 6 Wal. 142; *Mackay v. Easton*, 19 Wal. 619; *Rector v. United States [Hot Springs Cases]*, 92 U. S. 698.

8. And it makes no difference that the non-return of the survey in time to save the rights of the locator is due to the negligence of the surveyor-general, no steps by mandamus or otherwise having been taken by the locator to enforce a return. *Rector v. United States [Hot Springs Cases]*, 92 U. S. 698.

*Conflicting Claims — Spanish Titles, etc.*

See LANDS OF UNITED STATES — CONFLICTING CLAIMS, 22 *et seq.*

*Patents for Lands located on such Certificates.*

See LANDS OF UNITED STATES — PATENT, 13 *et seq.*

**LANDS OF UNITED STATES — PATENT — Execution and Issue of Patent, in general.**

See pl. 1, 2.

*Necessity for Issue and Delivery.*

See pl. 3-7.

**LANDS OF UNITED STATES — PATENT — continued.**

*Construction, Validity, and Effect.*

See pl. 8-26.

*Set aside, impeached, or controlled — When and how.*

See pl. 27-43.

*Presumption in Favor of Patent.*

See pl. 44, 45.

*Inures to whom.*

See pl. 46-49.

1. — *Execution and Issue of Patent, in general.* The statutory provisions respecting the manner in which a patent of the United States for land shall be executed are mandatory. No equivalent for any required formality, countersigning by the recorder of the general land office in person, or in his absence by the principal clerk of private land claims as acting recorder, for instance, is permissible. Each act is essential to the perfection and validity of the instrument. *McGarrahan v. New Idria Mining Co.*, 96 U. S. 316.

2. The commissioner of the land office cannot grant a patent under section 7 of the act of July 23, 1866 (14 Sts. 220), to quiet land titles in California, unless the purchaser bring himself by affirmative proof within the terms of the act, as by proof that the lands are not mineral lands. *Browning v. McGarrahan*, 9 Wal. 298.

3. — *Necessity for Issue and Delivery.* The right to a patent, once vested, is equivalent, as respects the government, to a patent issued; and a patent when issued relates back, so far as may be necessary to cut off intervening claimants, to the inception of the right of the patentee. *Stark v. Starr*, 6 Wal. 402.

4. Where an act confirms a title, no patent is required to vest title in the confirmer, and a patent subsequently issued is only documentary evidence of title. *Morrow v. Whitney*, 95 U. S. 551.

5. When a patent for public land is regularly signed, sealed, countersigned, and recorded, title passes without the delivery essential to a private grant, and the patentee's right to the patent is perfect, and may be enforced by mandamus. The secretary of the interior, therefore, may not withhold delivery because the patent may be voidable. That question can be settled afterwards in judicial proceedings. [WAITE, C. J., and SWAYNE, J., dissenting, holding that where a contest is pending in the department as to who has the better right to the land, when the patent is issued, it should be deemed to be issued improvidently, and the right to it to be not complete.] *United States v. Schurz*, 102 U. S. 378.

6. The act of June 6, 1874 (18 Sts. 62), to obviate the necessity of issuing patents for certain private land claims in Missouri, etc., applies only where the party interested is by law entitled to a patent. *Snyder v. Sickles*, 93 U. S. 203.

LANDS OF UNITED STATES — PATENT — *continued*.

7. The issue of a certificate by the register of the land office, under the act of May 10, 1800, § 7 (3 Sts. 76), showing payment to have been made for public lands, entitled the holder to a patent. The issue of the certificate, therefore, was a complete segregation of such lands from the public domain, and a subsequent sale by the United States to another person conveyed no title under which such person could maintain ejectment against the holder of the certificate. *Simmons v. Wagner*, 101 U. S. 260.

8. — *Construction, Validity, and Effect.*] A patent from the United States carries the fee, and is the best title known to courts of law. *Hooper v. Scheimer*, 23 How. 235.

9. A patent makes a valid title from its date, and is conclusive against all adverse rights not begun before its emanation. *Hoofnagle v. Anderson*, 7 Wheat. 212.

10. The boundaries and quantity of land granted by a patent must be ascertained by descriptive language in the patent. *Gazzam v. Phillips*, 20 How. 372.

11. In general, a patent in the name of a deceased person conveys no title. *Galloway v. Finley*, 12 Pet. 264.

12. A patent for land which has been already granted, reserved, or appropriated, is void. *Reichart v. Felps*, 6 Wal. 160; *Best v. Polk*, 18 Wal. 112; *Morton v. Nebraska*, 21 Wal. 660.

13. A patent issued on a location of a certificate issued under the act of February 17, 1815 (3 Sts. 211), for the relief of sufferers by earthquake in New Madrid County, Missouri, is void where, when it was issued, the land was reserved from sale, the holder of such a certificate having a right to locate it only on lands authorized to be sold. *Stoddard v. Chambers*, 2 How. 284; *Mills v. Stoddard*, 8 How. 345; *Easton v. Salisbury*, 21 How. 426.

14. A patent for lands in the Louisiana purchase claimed under French and Spanish grants, issued in 1827, on a location of a New Madrid certificate, made in 1818, was void, such lands being reserved from sale or other disposal. *Easton v. Salisbury*, 21 How. 426.

15. And it acquired no validity through a lapse of the reservation in 1829. *Ib.*

16. The patent issued to Lafayette and his heirs in 1825, on a location made by him in 1807, calling for vacant lands outside the line of six hundred yards abandoned by congress to the city of New Orleans, was good for such parts only of the land surveyed and patented as were vacant after congress had investigated and passed on private claims prior in date to his entry. *Lafayette v. Kenton*, 18 How. 197.

17. A patent issued for land withdrawn from appropriation by an Indian treaty is void. An entry in such case is without right, and the patent should be vacated. *United States v. Carpenter*, 111 U. S. 347.

LANDS OF UNITED STATES — PATENT — *continued*.

18. A patent or instrument of confirmation by an officer authorized to make it, followed by a survey, is conclusive evidence of reservation of the land from sale. *Reichart v. Felps*, 6 Wal. 160.

19. A patent fraudulently issued to a fictitious person transfers no title, and one claiming under a conveyance from the supposed patentee takes none, although he acts in good faith. *Moffat v. United States*, 112 U. S. 24.

20. A patent issued on a confirmed Mexican grant is in the nature of a conveyance by way of quitclaim. It is conclusive only as between the parties thereto, and is evidence that, as against the United States, the validity of the grant has been established. *Adam v. Norris*, 103 U. S. 591.

21. Recitals in patents for land reserved in an Indian treaty of cession for members of the tribe, that they were for the lands so reversed, were conclusive in favor of purchasers as to the identity of the lands. *Mann v. Wilson*, 23 How. 457; *Crews v. Burcham*, 1 Black, 352.

22. A patent issued on confirmation of a claim under the act of March 3, 1851 (9 Sts. 631), is not only a deed conveying the interest of the government, but a record of the action of the government on the title of the claimant as it was on the acquisition of the territory, operating, as such, as evidence that the claim was valid under the laws of Mexico and protected by the treaty of cession, and that it is correctly located; and, as against the government and parties claiming under it, that record, unvacated, is conclusive. *Beard v. Federy*, 3 Wal. 478.

23. The "third persons," therefore, mentioned in section 15 of that act, against whom such a patent is not conclusive, are not all persons other than the government and the claimants, but only those who hold superior titles, such as will enable them successfully to resist any action of the government in disposing of the property. *Ib.*

24. A patent issued to one whose claim under a Spanish title in Missouri had been confirmed by commissioners pursuant to an act of congress, is conclusive evidence that the grantee was the lawful owner of the title confirmed, and that his was the best Spanish title. *Landes v. Brant*, 10 How. 348.

25. Accidental obliteration of the consideration in a patent does not avoid the grant. *Polk v. Wendal*, 9 Cranch, 87.

26. Where a patent issued on a survey of a grant is returned by the grantee to the commissioner of the general land office, and he orders another survey, a patent issued on the second survey is not invalid because it purports to convey lands in addition to lands covered by the prior patent. *Adam v. Norris*, 103 U. S. 591.

27. — *Set aside, impeached, or controlled, when and how.*] If the proceedings on which the patent was founded were irregular, the government, but no one without a prior equity, can



**LANDS OF UNITED STATES — PATENT — continued.**

take advantage of it. *Hoofnagle v. Anderson*, 7 Wheat. 212.

28. The issue of the grant or patent conveys the title, and questions of fraud or irregularity or excess in the survey cannot be raised by parties other than the government. *Spencer v. Lapsley*, 20 How. 264.

29. A patent valid on its face is conclusive at law as to all matters determinable by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. It may be impeached collaterally only by showing that the department had no jurisdiction to dispose of the land. The regularity of the proceedings cannot be thus assailed. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636.

30. The validity of a patent cannot be assailed collaterally because false and perjured testimony may have been used to secure it. *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447.

31. If a patent be obtained of the United States by fraud, a bill in equity will lie to set it aside, as in the case of a conveyance by any other proprietor. *United States v. Hughes*, 11 How. 552.

32. It is the settled rule that where a patent is obtained by fraudulent imposition on the officers of the land department, equity will relieve the party legally entitled to receive the patent. *Garland v. Wynn*, 20 How. 6.

33. If a patent be issued by mistake for land by law reserved from sale, a bill in equity at suit of the United States will lie to procure it to be cancelled. *United States v. Stone*, 2 Wal. 525.

34. A patent issued through mistake or inadvertence of the officers of the land office, whether valid until annulled, or void as issued without authority, may be set aside in equity at suit of the government, as *prima facie* it passes title. *Hughes v. United States*, 4 Wal. 232.

35. Where a patent is issued to one who protests against the survey on which it is made, and who never accepts it, the secretary of the interior may recall it. *Maguire v. Tyler*, 8 Wal. 650.

36. Only the attorney-general, or some one authorized to use his name, can bring a suit to set aside a patent for land issued by the United States, or a judgment rendered in one of its courts on which such a patent is founded. *United States v. Throckmorton*, 98 U. S. 61.

37. A bill in equity, brought to set aside a decree rendered fifteen years before, confirming a patent, must make specific allegations. Mere general allegations of fraud and conspiracy in procuring the patent are not enough to impeach the decree. *United States v. Atherton*, 102 U. S. 372.

38. The United States, in a bill to cancel a patent fraudulently issued to a fictitious person, is not bound to offer to return the scrip received

**LANDS OF UNITED STATES — PATENT — continued.**

for it, the pretended patentee having no existence, and of course no agent. *Moffat v. United States*, 112 U. S. 24.

39. To charge the holder of a patent as a trustee, it is not enough to show that the patent should not have been issued to him; it must also appear that it should have been awarded to the plaintiff. *Bohall v. Dilla*, 114 U. S. 47.

40. Where a patent has been obtained by false swearing on *ex parte* proceedings, the right of the United States to maintain a suit in equity to have it vacated is the same as the right of an individual to recover back land obtained from him by fraud. *United States v. Minor*, 114 U. S. 233.

41. The right is not affected by the indictment or conviction of the patentee, or by the forfeiture, under Rev. Sts. § 2262, of the money paid. *Ib.*

42. There need be no offer to return the money paid, since section 2262 declares that it shall be forfeited. *Ib.*

43. An equity of the grantee to recover more or different land cannot control the language of the patent in an action at law. *Gazzam v. Phillips*, 20 How. 371.

44. — *Presumption in Favor of Patent.*] Where a patent has been issued, it is to be presumed that all steps necessary to regularity therein have been taken. *Polk v. Wendal*, 9 Cranch, 87; *Bagnell v. Broderick*, 13 Pet. 436; *Minter v. Crommelin*, 18 How. 87.

45. The presumption of regularity which attaches to the proceedings preliminary to the issue of a patent has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud on the part of government officials, as, for instance, where they are charged with having procured its issue to a fictitious person. *Moffat v. United States*, 112 U. S. 24.

46. — *Inures to whom.*] Where one having an inchoate title to land in the French territory of what is now Missouri, bound himself, on a sufficient consideration, to perfect his title for the benefit of his grantee, it was held that a patent subsequently issued by the United States, after acquisition of that territory, to the grantor "or his legal representatives," after due confirmation of the title in that form, inured to the benefit of his grantee. *Carpenter v. Rannels*, 19 Wal. 138.

47. A patent by congress directed to issue to one to whom the Spanish governor of upper Louisiana had made a concession, or his legal representatives, held to inure, as against the heirs-at-law, to one to whom the concessionee had long before conveyed all his interest in the land conceded. *Morrison v. Jackson*, 92 U. S. 654; *Morrison v. Benton*, *Id.* 664.

48. The United States having agreed to grant to an Indian chief two sections of land to be

**LANDS OF UNITED STATES — PATENT — continued.**

thereafter selected, and to convey them by patent, and the chief, after their selection, having aliened them by deed in fee with covenants of warranty, and died, it was held that the patent issued after his death inured to the benefit of his alienee. *Elwood v. Flannigan*, 104 U. S. 562.

49. A patent erroneous as to the Christian name of the patentee conveys no title, and cannot affect the title under a proper patent subsequently issued. *Bell v. Hearne*, 19 How. 252.

*Bounty Warrants — Patents issue to whom — Assignee — Proof of Entry, etc.*

See **LANDS OF UNITED STATES — BOUNTY WARRANTS.**

*Claims to Land under Patents or Acts of Congress — Federal Questions — Ground of Error to State Court.*

See **ERROR TO STATE COURT — JURISDICTION**, 81-102.

*Effect as against other Grounds of Right — Various Cases — Conflicts between Patents.*

See **LANDS OF UNITED STATES — CONFLICTING CLAIMS.**

*Fraud in Issue of Patent by Proper Officers — Question for a Court of Equity.*

See **FEDERAL COURTS — PRACTICE**, 52.

*Inures to Grantee of Indian Patentee.*

See **INDIANS**, 16.

*Inures to whom — Oregon Donation.*

See **LANDS OF UNITED STATES — LEGISLATIVE GRANTS**, 84.

*Inures to whom — Purchaser from Pre-emptor.*

See **LANDS OF UNITED STATES — PRE-EMPTION**, 42.

*Powers, etc., of Land Officers relative to Patents — Issue and Recall.*

See **LANDS OF UNITED STATES — LAND OFFICE.**

**LANDS OF UNITED STATES — PRE-EMPTION —**

*Who may make Pre-emption.*

See pl. 1-7.

*Lands Subject to Pre-emption.*

See pl. 8-31.

*Proceedings in Acquisition of the Right.*

See pl. 32-54.

*Sale and Assignment by Pre-emptor.*

See pl. 55-59.

1. — *Who may make Pre-emption.*] The general policy of the government to protect those who in good faith have settled and made improvements on the public land traced in federal legislation. *Rector v. Gibbon*, 111 U. S. 276.

2. Government officers are not deprived by any statute of the benefit of the pre-emption laws. *United States v. Fitzgerald*, 15 Pet. 407.

3. Under the act of July 9, 1832, § 3 (4 Sts. 565), and the supplementary act of March 2,

**LANDS OF UNITED STATES — PRE-EMPTION — continued.**

1833 (4 Sts. 661), concerning Missouri land titles, a claimant under a Spanish grant who relinquished his claim, might purchase as a pre-emptor, whether then an actual settler and house-keeper on the land or not. *O'Brien v. Perry*, 1 Black, 132.

4. But if otherwise, the claimant residing on a town lot included in the tract to which the claim extended would not be rendered a non-resident of rest of the tract by confirmation of his claim to that particular lot under another statute. *Ib.*

5. The acts of May 29, 1830, January 23, 1832 (4 Sts. 420, 496), and September 4, 1841 (5 Sts. 453), relate to rights of pre-emption conferred on actual settlers, and do not apply where no entry has been made under any of them. *Irvine v. Irvine*, 9 Wal. 617.

6. The object of § 7, act of July 23, 1866 (14 Sts. 218), to quiet land titles in California, was to withdraw from the general operation of the pre-emption laws lands continuously possessed and improved by a purchaser under a Mexican grant subsequently rejected or limited to a quantity less than that embraced in the boundaries designated, and to give him, exclusive of all other claimants, the right to obtain the title. *Hosmer v. Wallace*, 97 U. S. 575.

7. The proviso to section 8, that nothing in the act "shall be construed so as in any manner to interfere with the right of *bona fide* pre-emption claimants," does not affect the right of such a grantee as against such a claimant. The term *bona fide* as applied to a pre-emption claimant does not change his qualifications, or the conditions on which, under the general law, a settlement with a view to pre-emption is permitted. *Ib.*

8. — *Lands Subject to Pre-emption.*] A statute conferring authority "to enter" a certain quantity of land does not authorize a location on lands previously appropriated or withdrawn from among the lands offered for sale. *Chotard v. Pope*, 12 Wheat. 586.

9. Public land directed by the president to be reserved for use as a military post, held not liable, under the act of May 29, 1830 (4 Sts. 420), to entry under a pre-emption claim, because appropriated for a public purpose within the meaning of that act. *Wilcox v. Jackson*, 13 Pet. 498. See *Leavenworth, Lawrence, & Galveston Railroad Co. v. United States*, 92 U. S. 733.

10. The acts of March 3, 1811 (2 Sts. 662), May 11, 1820 (3 Sts. 573), and June 15, 1832 (4 Sts. 534), and the Spanish regulations concerning back and double concessions of land in Louisiana, considered. *Jourdan v. Barrett*, 4 How. 169.

11. The proviso in the act of 1811, § 5, excluding from the right of pre-emption back lands "fit for cultivation, bordering on another river, creek, bayou, or watercourse," referred only to lands fit for cultivation bordering on some navigable water. *Surgett v. Lapice*, 8 How. 48.

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12. The right of pre-emption, under the act of May 29, 1830 (4 Sts. 420), is limited to the fractional quarter-section on which improvements are made. *Lyle v. Arkansas*, 9 How. 314.

13. Common field-lots, out-lots, etc., in Missouri, appropriated to school purposes, under the act of June 13, 1812 (2 Sts. 748), and acts supplementary thereto, were not subject to entry under a right of pre-emption. *Kissell v. St. Louis Public Schools*, 18 How. 19.

14. Where the governor of a territory was by act of congress authorized to select lands to aid in the erection of public buildings in the territory, lands selected as soon as they were surveyed were held not afterwards open to pre-emption under a law thereafter enacted. *Barnard v. Ashley*, 18 How. 43.

15. But selection could not be made of land in possession of a settler under an existing pre-emption law when the survey was made. *Ib.*

16. When sections reserved to the United States, alternate to sections granted in aid of a railroad or other public improvement, are again put in the market so as to become subject to entry at private sale, they lose their character as reserved lands, are taken out of the exception in § 10, act of September 4, 1841 (5 Sts. 546), and become subject to pre-emption. *Clements v. Warner*, 24 How. 394.

17. Section 4 of the act of March 3, 1843 (5 Sts. 620), which provides that where one has filed a declaration of intention to pre-empt one tract of land he cannot lawfully file another declaration for another tract, applies only where the land is subject to private sale. *Johnson v. Towseley*, 13 Wal. 72; *Lamson v. Smiley*, Id. 91.

18. If the lands claimed by Carondelet, Missouri, as a part of the common lands the title to which was confirmed by the act of June 13, 1812 (2 Sts. 748), were open to selection by the state as a part of the land granted thereto for purposes of internal improvement by the act of September 4, 1841 (5 Sts. 453), before ascertainment of the boundary line, they were equally open to pre-emption; and a pre-emptor who took the initiatory step of settlement thereon, before selection by the state, and followed it up to the due procurement of a patent, acquired title as of the date of settlement; for although a mere settler acquires no vested right as against the government until all prerequisites have been complied with, as against a grantee or donee of the government, it is otherwise, the first in time being deemed the first in right. *Shepley v. Cowan*, 91 U. S. 330. See *Frisbie v. Whitney*, 9 Wal. 187; *Hutchings v. Low*, 15 Wal. 77.

19. Under the act of April 20, 1832 (4 Sts. 505), reserving lands embracing the Hot Springs of Arkansas for the future disposal of the United States, those lands, the Indian title to which was not extinguished until 1818, when they were ceded to the United States by the treaty with

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the Quapaws, and no survey of which was made until 1838, were not open to settlement and pre-emption under the act of April 12, 1814 (3 Sts. 121), for the adjustment of land titles in Louisiana and in Missouri Territory; and this, notwithstanding § 3, act of March 1, 1843 (5 Sts. 603), which declares that settlers south of the Arkansas River shall have the same benefits under the act of 1814 that those north of it have, — benefits as of the extinguishment of the Indian title not being contemplated. *Rector v. United States [Hot Springs Cases]*, 92 U. S. 698. See *Gaines v. Hale*, 93 U. S. 3.

20. Nor were they, under the pre-emption act of May 29, 1830 (4 Sts. 420), as the act remained in force but a year, and had no application to unsurveyed lands; and the act of July 14, 1832 (4 Sts. 603), waiving proof and entry where prevented by want of a survey, makes no difference, as, like the act of 1830, it did not extend to lands reserved, as these then were, to the United States. *Ib.*

21. The act of March 3, 1853 (10 Sts. 244), providing for the survey of the public lands in California, the granting of pre-emption rights therein, etc., excepts from the operation of the pre-emption law, to which the public lands generally are subject, school sections sixteen and thirty-six; asserts a rule to govern the right of pre-emption of school sections; and protects a settlement, if the surveys, when made, ascertain its location to be on a school section. In such case the only right conferred on the state is to select other land in lieu of that so occupied. The proviso to section 6, forbidding pre-emption on unsurveyed lands after one year from the passage of the act, is limited to the lands not excepted out of that section, and has no application to the school sections so excepted. *Sherman v. Buick*, 93 U. S. 209.

22. Unserved lands in California were not open to pre-emption settlement after the expiration of the time limited by the act of March 1, 1854 (10 Sts. 268), which gave the right to make such settlements for two years, until after the right was again conferred by the act of May 30, 1862 (12 Sts. 409). *Hosmer v. Wallace*, 97 U. S. 575.

23. Lands in California to which there are pending Mexican claims are not open to settlement under the pre-emption laws; and this, where the claim is to a tract with specified boundaries, and the only question is whether, under the concession, the claimant is not entitled to a certain smaller quantity only, within those boundaries. *Van Reynegan v. Bolton*, 95 U. S. 33.

24. And such claimant, duly invested with possession by the Mexican authorities, may maintain ejectment in the mean time against a settler on any part of the entire tract. *Ib.*

25. A survey by the surveyor-general of the smaller quantity, after a decree confirming the

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claim, will not affect the claimant's right to such possession, the survey being contested and not yet approved by the general land department. *Ib.*

26. Land in California claimed under a Mexican title was not open to pre-emption pending an adjudication on the validity of the claim. *Trenouth v. San Francisco*, 100 U. S. 251.

27. Pending a proceeding in a federal tribunal for confirmation of a claim to land in California under a Mexican grant of a certain quantity within boundaries embracing a larger quantity, the quantity granted to be measured and segregated, none of the lands within those boundaries were open to pre-emption settlement until it was determined what lands were covered by the grant. Until then they were not "public lands" within the meaning of the pre-emption laws. *Hosmer v. Wallace*, 97 U. S. 575.

28. Section 1 of the act of July 23, 1866 (14 Sts. 218), confirming titles to lands in California selected under the act of March 3, 1853 (10 Sts. 244), granting sixteenth and thirty-sixth sections to the state for school purposes, and excepting "any land held or claimed under any valid Mexican or Spanish grant," embraces within the exception land excluded, on the final survey, from within the limits of a valid Mexican grant. Such exclusion restores the land to the public domain, opens it to pre-emption, and gives a pre-emptor a right to a patent paramount to the right of a claimant under a state selection who renews his claim after the pre-emptor's rights have attached. *Aurrecoechea v. Bangs*, 114 U. S. 381.

29. The act of August 14, 1848 (9 Sts. 323), organizing the territory of Oregon, which declared all federal laws to be there in force, so far as applicable, did not extend to the territory the law of pre-emption, as expressed in either the pre-emption act of September 4, 1841 (5 Sts. 453), or the act of May 23, 1844 (5 Sts. 657). *Stark v. Starr*, 6 Wal. 402.

30. Persons settling on public lands in Oregon before the organization of the territorial government acquired no rights as against the United States. They were merely tenants at sufferance, and could transfer no right, except the right of occupancy. *Missionary Society v. Dalles*, 107 U. S. 336; *Missionary Society v. Kelly*, Id. 347.

31. Where, from a grant of land in aid of a railroad company, an exception is made of lands to which pre-emption or homestead claims shall have attached at the time of the definite location of the line of the road, and provision is made for filing a map within a certain time designating the general route, after which lands within a specified limit are to be withdrawn from pre-emption, private entry, and sale, and the map not being filed within the time specified, an extension of time is granted, and it is provided that, after the filing, lands within the limit are to be withdrawn from sale, the words "pre-emption" and "private entry" used in the original act

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being omitted, a pre-emption or homestead claim may attach to lands within the limit at any time before the definite location of the road is fixed. *Kansas Pacific Railway Co. v. Dunmeyer*, 113 U. S. 629.

32. — *Proceedings in Acquisition of the Right.*] The right of pre-emption inures only in favor of a claimant when he has performed the conditions of actual settlement, inhabitation, and improvement. As he cannot perform them on land occupied by another, his right cannot extend to land so occupied. *Hosmer v. Wallace*, 97 U. S. 575.

33. To bring one within the provisions of the pre-emption laws, a continuous personal residence is indispensable, except under such special circumstance as sickness, fear of violence, etc. *Bohall v. Dilla*, 114 U. S. 47.

34. A right of pre-emption cannot be founded on a forcible intrusion on public land cultivated, enclosed, and peaceably occupied by another. *Atherton v. Fowler*, 96 U. S. 513; *Trenouth v. San Francisco*, 100 U. S. 251. And see *Frisbie v. Whitney*, 9 Wal. 187.

35. Mere occupation and improvement of public land, with a view to pre-emption, although they confer an inchoate right as against other persons where the land is afterwards offered for sale, which the land officers are bound to respect and the courts will protect, do not confer a vested right as against the government. Such a vested right is not acquired until the purchase-money is paid and a receipt given by the proper officer; and until then congress may withdraw the land from entry, although it thereby defeat the right of the settler. *Frisbie v. Whitney*, 9 Wal. 187; *Hutchings v. Low* [*Yosemite Valley Case*], 15 Wal. 77.

36. Thus, where one entered and settled on land in the Yosemite Valley with a declared intention of pre-empting it, he was held to have acquired no right superior to that of California under the subsequent act of June 30, 1864 (13 Sts. 325), granting that valley and the Mariposa grove to the state to be held perpetually for public use. *Hutchings v. Low*, 15 Wal. 77.

37. Residence in a house standing on the line dividing two quarter-sections, is residence in both quarters, and sufficient, the claimant being in possession of both, to support a right of entry to either. *Lindsey v. Hawes*, 2 Black, 554; *Silver v. Ladd*, 7 Wal. 219.

38. A settlement on a portion of a quarter-section, and the making of the improvements required by law, will sustain a pre-emptive claim to the whole quarter-section as against subsequent settlers; and a subsequent settlement is not improved nor in any respect rendered more efficacious by purchase from earlier occupants. *Quinby v. Conlan*, 104 U. S. 420.

39. The proviso in the act of June 15, 1832 (4 Sts. 534), requiring claimants by pre-emption

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of back lands in Louisiana to give notice of claim before proclamation of sale, was merely prospective, and did not apply where proclamation was made before the act was passed. *Surgett v. Lapice*, 8 How. 48.

40. Under the act of February 5, 1829 (4 Sts. 334), concerning the town of Galena, claimants by pre-emption or settlement gained no vested right until they proved their claims and paid the purchase-money. *Morehouse v. Phelps*, 21 How. 294.

41. Under the act of July 2, 1836 (5 Sts. 79), appointing commissioners to take proof of claims, where a patent issued to the "legal representatives" of a claimant, one who presented the claim, procured the certificate of the commissioners, paid the purchase-money, and received the patent, is to be deemed to be such representative. *Ib.*

42. The patent does not inure to one who had purchased from the settler many years before, but who took no interest in the matter, and asserted no claim until after the patent was issued. *Ib.*

43. A declaration of intention to pre-empt land not proclaimed for sale is seasonably filed, under the act of March 3, 1843, § 5 (5 Sts. 619), if filed before another person has begun a settlement or filed a declaration, although that section requires the declaration to be filed within three months of settlement, the intention being merely to give the better right to the second settler in case of the neglect of the first one. *Johnson v. Towseley*, 13 Wal. 72.

44. Under the act of March 3, 1853 (10 Sts. 244), providing for the survey, pre-emption, and sale of lands in California, a settler cannot pre-empt a quarter-section, or any part thereof included in his settlement, unless on return of the government survey to the local land office that his dwelling-house was on that quarter-section. *Ferguson v. McLaughlin*, 96 U. S. 174.

45. Under that act a settler on unsurveyed public land in California could acquire by settlement no right of pre-emption where he filed no declaratory statement after the return of the plat of the survey to the proper local land office. *Lansdale v. Daniels*, 100 U. S. 113.

46. The requirement of the act of September 4, 1841 (5 Sts. 453), and of the act of 1853 relating to the pre-emption of public land, that proof of payment must be made and the required affidavit filed before the time fixed for public sale, is imperative and indispensable. If a patent is issued to one who has disregarded this provision of law, a purchaser at the sale may obtain relief in equity against such outstanding patent. *Moore v. Robbins*, 96 U. S. 530.

47. One who, under the act of 1841, providing that no person should be entitled to more than one pre-emptive right by virtue thereof, entered a quarter of a quarter-section must be deemed to have abandoned his right to enter the

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whole quarter-section, and, therefore, to be not within the purview of state statutes giving to those residing on lands claimed by the Cairo and Fulton Railroad Company a preferred right to purchase, except as to the quarter of a quarter-section, although he cultivated parts of the other three quarters. *Nix v. Allen*, 112 U. S. 129.

48. Section 2, act of July 14, 1870 (16 Sts. 279), relating to settlers on lands reserved for railroad purposes, giving claimants of pre-emption rights eighteen months from the time limited for filing the declaratory statement, where no shorter period is prescribed, in which to make proof and payment, applies to one who, on January 18, 1871, settled on part of an even-numbered section which, although previously offered at public sale, had been withdrawn from private entry, being within a railroad grant. *Morrison v. Stalnaker*, 104 U. S. 213.

49. Where one has filed a declaration of intention to claim the right of pre-emption for one tract of land, he cannot afterwards file a second declaration for another tract. Section 2261, Rev. Sts., which re-enacts the law before in force, makes this apparent. *Baldwin v. Stark*, 107 U. S. 463.

50. One who makes an entry on land appropriated to school purposes, and so not subject to pre-emption, cannot be heard to say that he did not know that the land was so appropriated. *Kissell v. St. Louis Public Schools*, 18 How. 19.

51. An agreement between two persons that one of them shall make a pre-emption entry of public land by means of a simulated settlement and false proof, for the benefit of both, is void as against public policy, and will not support a suit in equity for the legal title. *Harkness v. Underhill*, 1 Black, 316.

52. If the government make a survey of land with a plat approved by the proper officer, sell a parcel thereof to a pre-emptor in accordance with that survey, give a certificate of purchase, and receive the purchase-money, it is bound by the survey and sale, so that it cannot, by a new survey, defeat the title of the purchaser by excluding his settlement. *Lindsey v. Hawes*, 2 Black, 554.

53. The rights of one who has settled on public land with a view to its pre-emption cannot be prejudiced by a refusal of the local land officers to receive his proofs of settlement, based on an erroneous opinion that the land is reserved from sale. *Shepley v. Cowan*, 91 U. S. 330.

54. The misconduct or neglect of an officer of the land office will not be permitted to prejudice a pre-emption claim which would be valid but for such misconduct or neglect. *Lytle v. Arkansas*, 9 How. 314.

55. — *Sale and Assignment by Pre-emptor.* A settler entitled to pre-emption has an interest which is the subject of sale. *Thredgill v. Pinard*, 12 How. 24.

**LANDS OF UNITED STATES — PRE-EMPTION**  
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56. The act of June 19, 1834 (4 Sts. 678), revived the act of May 29, 1830 (4 Sts. 420), as amended by the act of January 23, 1832 (4 Sts. 496), so that a pre-emptor could thereunder assign his certificate of pre-emption and location at any time after entry at the land office. *Marks v. Dickson*, 20 How. 501.

57. Although an assignment of a float, made before entry at the land office, was void, a power to assign, though made before location, would support one made after location. *Ib.*

58. That provision of the act of September 4, 1841 (5 Sts. 453), which avoids all assignments and transfers of rights thereby secured, prior to the issuing of the patent, extends only to a mere pre-emption right, and does not forbid a sale after the pre-emptor has made entry and payment and is the owner in good faith, although he has not obtained a patent. *Myers v. Croft*, 13 Wal. 291.

59. The inference in favor of the right of one in possession merely of public land is but very slight. He can base no equity on his possession, nor on the failure of the United States to assert title as against him. *Simmons v. Ogle*, 105 U. S. 271.

*Conflicting Claims — Various Rights.*

See **LANDS OF UNITED STATES — CONFLICTING CLAIMS.**

**LANDS OF UNITED STATES — TIMBER — Cutting, an Indictable Offence — Compromise — Right of Indians to cut Timber.]** Under the act of March 2, 1831 (4 Sts. 472), to cut oak or hickory trees on the public lands, with intent to appropriate, is an indictable offence. *United States v. Briggs*, 9 How. 351.

2. Where one having cut timber from the public domain enters into a compromise of the trespass with the timber agent of the land department, as permitted by instructions to such agent from the commissioner of the land office, he thereby acquires title, and the timber agent cannot disregard the compromise and sell the timber to another. *Wells v. Nickles*, 104 U. S. 444.

3. Although the Indians on public lands, having but a right of occupancy, may cut timber as may a tenant for life, to improve the land or to fit it for more convenient occupation, and when so cut may sell it, they cannot cut timber for sale merely. The presumption, therefore, is that timber cut and offered for sale is cut without authority, and a purchaser is charged with knowledge of the presumption. *United States v. Cook*, 19 Wal. 591.

*Appointment of Timber Agents.*

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**LANDS OF UNITED STATES — TITLE, ETC. —**

*Origin of Title — Lands in New States, etc.]* The government of the United States succeeded to the exclusive right of the British government, originally founded on discovery and conquest, to the land occupied by the Indians. *Johnson v. McIntosh*, 8 Wheat. 543.

2. Thus, the government possesses the exclusive right to grant the soil to individuals, subject only to the Indian right of occupancy. *Ib.*; *Mitchel v. United States*, 9 Pet. 711; *United States v. Fernandez*, 10 Pet. 303; *United States v. Rillieux*, 14 How. 189.

3. And, therefore, a title to land derived solely from a grant to a private person, made in 1773 and 1775 by an Indian tribe northwest of the Ohio, cannot be recognized in the federal courts. *Johnson v. McIntosh*, 8 Wheat. 543.

4. The English possessions in America were not claimed by right of conquest, but of discovery, and were held by the king as the representative of the nation for whose benefit the discovery was made. *Martin v. Waddell*, 16 Pet. 367.

5. The United States holds the public lands in the new states, not by the right of eminent domain, but by force of deeds of cession and of the statutes connected therewith. *Pollard v. Hagan*, 3 How. 212.

6. By the laws of Spain, the Indians had a right of occupancy; but they could not part with it, except in the mode pointed out by those laws. *Chouteau v. Molony*, 16 How. 203.

7. The United States does not own the public quays on the Mississippi River in New Orleans, nor the land made in front thereof by accretion. *New Orleans v. United States*, 10 Pet. 662.

8. The act of February 17, 1815 (3 Sts. 211), for the relief of sufferers by earthquake in New Madrid County, Missouri, contemplated that the title of the patentee to the injured land should revert to the United States on the issue of the patent to the land granted to him in lieu thereof. *Mackay v. Easton*, 19 Wal. 619.

9. A conveyance from a city, *e. g.* the city of Carondelet, to the United States of a part of its commons, on which government barracks were situate, founded on an equitable compromise of a long pending and then doubtful question of title, held valid, although by the law relating to surveys, as since settled, the city has title under existing surveys to all its commons, and notwithstanding any question as to the power of the commissioner of the general land office to set such survey aside. *St. Louis v. United States*, 92 U. S. 462.

10. An act of congress directing the appropriation and possession of land covered by an old French grant, after forfeiture for non-fulfilment of conditions of improvement and occupancy, is equivalent to office found, and reunites the land to the public domain. *United States v. Repentigny*, 5 Wal. 211.

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11. So of an act making like provision as to land covered by an old Spanish grant. *McMicken v. United States*, 97 U. S. 204.

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**LARCENY.**—The act of March 3, 1825, § 9 (4 Sts. 116), punishing the theft of goods belonging to vessels in distress, extends to offences committed above high-water mark. *United States v. Coombs*, 12 Pet. 72.

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**LATERAL SUPPORT**—*Extent of the Right thereto.*] The right of lateral support extends only to the soil in its natural condition, not to that put upon it which increases the downward and lateral pressure. *Northern Transportation Co. v. Chicago*, 99 U. S. 635.

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**LEGISLATURE — Powers — To determine Jurisdiction of Federal Courts — To exercise Judicial Functions — To validate a Void Contract or Conveyance — To alter County Lines — To refund Taxes, etc.]** The legislature of a state cannot determine whether a federal court has jurisdiction. *United States v. Peters*, 5 Cranch, 115.

2. The constitution does not forbid the exercise of judicial functions by a state legislature. *Satterlee v. Mathewson*, 2 Pet. 380.

3. A special act authorizing an administrator to sell land and apply the proceeds to the payment of debts, held not an exercise of judicial as distinguished from legislative power. *Watkins v. Holman*, 16 Pet. 25.

4. To construe a statute is a judicial, not a legislative, duty. The legislature cannot, by a mere declaration of the meaning of a statute, deprive parties of rights conferred by the statute as construed by the courts. The utmost effect of such a declaration would be to change the law in its application to future transactions. Where, therefore, the legislature assumes so to construe a statute as to deny the right to compound interest in cases where it was given by earlier statutes, such attempt at construction is without force. *Koshkonong v. Burton*, 104 U. S. 668.

5. A void conveyance, although not confirmable by the deed of the grantor, may be made valid by the legislature. *Wilkinson v. Leland*, 2 Pet. 627.

6. A contract originally invalid because usurious may be validated by statute. *White Water Valley Canal Co. v. Vallette*, 21 How. 414.

7. In the absence of limitation in the constitution or other organic law of a state or territory, the legislature has power to enlarge or diminish the area of a county, as public necessity or convenience may require. *Laramie County Commissioners v. Albany County Commissioners*, 92 U. S. 307.

8. Unless restrained by the state constitution, a state legislature may direct restitution to the taxpayers of a municipal corporation of property exacted by taxation, into whatever form it may have been changed, if it still remains in the pos-

**LEGISLATURE — continued.**

session of the municipality: the exercise of such a power infringes no provision of the federal constitution. *Tippecanoe County Commissioners v. Lucas*, 93 U. S. 108.

*Appointment of Guardians for non-Resident Infants having Property in State, etc.* — Power to authorize.

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**LEGITIMACY — Presumptions in Favor.]** Every intendment is to be made in favor of legitimacy. *Patterson v. Gaines*, 6 How. 550.

2. *Prima facie* evidence of marriage raises a presumption of the legitimacy of subsequent issue, and he who denies it has the burden of disproving the marriage. *Id.*

3. A testamentary recognition of the legitimacy of a child of the testator raises a presumption of legitimacy of the highest authority. *Gaines v. Hennen*, 24 How. 553.

4. The presumption of the legitimacy of children arising from an acknowledgment of them by the father, and a recognition by him of the mother with whom he lives, as his wife, is not a

**LEGITIMACY — continued.**

presumption of law. *Blackburn v. Crawford*, 3 Wal. 175.

5. In Maryland, if the parents of children had in concubinage marry, and recognize the children as their own, the children are deemed legitimate. *Id.*

6. In Louisiana, if a man marry in the belief *bona fide* that the woman is free to marry because of the invalidity of a former marriage, the issue of the marriage will be legitimate; and the fact of marriage being proved, the presumption of law is in favor of good faith. *Gaines v. New Orleans*, 6 Wal. 642.

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**LIBEL — Admiralty — Form — Requisites — Cross-libel.**

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*Divorce — Libel for.*

See DIVORCE.



**LIBEL AND SLANDER** — *What Words are actionable — Presumption of Malice — Privileged Communications.*

See pl. 1-6.

*Action — Pleading — Evidence — Practice — Damages.*

See pl. 7-11.

1. — *What Words are actionable — Presumption of Malice — Privileged Communications.*] Spoken words charging a woman with fornication in the District of Columbia are not actionable *per se*, fornication not being an indictable offence. *Pollard v. Lyon*, 91 U. S. 225.

2. A privileged communication is actionable, if malicious. Thus, a letter to the president of the United States containing false and malicious charges against a public officer of the executive department is actionable. *White v. Nicholls*, 3 How. 266.

3. Want of probable cause will authorize the inference of malice. *Ib.*

4. A report by the president and directors of a corporation to the stockholders of an investigation of the conduct of its officers or agents is privileged, if made in good faith and without malice. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Quigley*, 21 How. 202.

5. But the privilege does not extend to the preservation of the report and the evidence as a book for distribution among stockholders or in the community. *Ib.*

6. Communications made to the state's attorney for the purpose of ascertaining whether the grand jury will be likely to find a bill against one are privileged on the ground of public policy as well as on the ground that they are professional communications, and, in an action of slander therefor, the attorney cannot be compelled to reveal them; and it makes no difference that they were made to others as well. *Vogel v. Gruaz*, 110 U. S. 311.

7. — *Action — Pleading — Evidence — Practice — Damages.*] In an action for a libel committed under circumstances of privilege, but with malice, the plaintiff must aver and prove actual malice; but he need not aver the facts constituting malice, but only that the writing was maliciously published. *White v. Nicholls*, 3 How. 266.

8. In an action for words spoken that are not actionable *per se*, an allegation of special damage is necessary, and, as such, an allegation that the plaintiff "has been damaged and injured in her name and fame" is not sufficient. *Pollard v. Lyon*, 91 U. S. 225.

9. A publication made after suit brought is not admissible in evidence in support of an action for libel. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Quigley*, 21 How. 202.

10. In an action for a libel, as it is for the jury to determine whether the publication was malicious, the alleged libel must be submitted to them. *White v. Nicholls*, 3 How. 266.

**LIBEL AND SLANDER** — *continued.*

11. Exemplary damages cannot be recovered in an action for libel without proof of actual malice. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Quigley*, 21 How. 202.

*Liability of Corporation for Libel.*

See CORPORATION — POWERS AND LIABILITIES, 43.

*Privileged Communications.*

See ATTORNEY, 42-44.

**LICENSE** — *Federal License of Business prohibited by State — Effect.*

See INTERNAL REVENUE — IN GENERAL, 6, 7.

*Ferry Licenses — In general.*

See MUNICIPAL CORPORATION — POWERS IN GENERAL, 13-15.

*Internal Revenue Acts — License thereunder, in general.*

See INTERNAL REVENUE.

*Patent — License to use, etc.*

See PATENT — LICENSE.

*Patent — Suit for Infringement.*

See PATENT — INFRINGEMENT.

*State Power to increase License Fee.*

See CORPORATION — CHARTER, 45.

*State Tax imposed by Way of License — Regulation of Inter-state Commerce.*

See TAX — POWER, 22 *et seq.*

*Tax — Power to impose as affected by Corporate Charter.*

See CORPORATION — CHARTER, 11.

*Trade with the Enemy — Rebellion.*

See TRADING WITH ENEMY, 13 *et seq.*

**LIEN** — *Lien on Particular Fund — Banker's Lien — Lien of Insurance Broker on Policy — Liens on Mines — On Railroads — How acquired, lost, or enforced, etc.*] To the creation of a lien on a particular fund, some distinct appropriation thereof by the debtor is necessary. *Wright v. Ellison*, 1 Wal. 16.

2. A mere personal agreement to pay a claim out of the fund does not charge the fund with a lien. *Trist v. Child*, 21 Wal. 441.

3. To create a lien on a particular fund for future services, there must be not only an express promise by the employer relied on by the employee to apply it in payment therefor, but some act of appropriation by the employer relinquishing control of the fund and conferring on the contractor the right to have it so applied when the services are rendered. *Dillon v. Barnard*, 21 Wal. 430.

4. An agreement to allow an agent for the collection of a claim against a foreign government a certain per cent of the amount recovered, gives a lien on the fund to that extent. *Wylie v. Coxe*, 15 How. 415.

**LIEN — continued.**

5. If underdue negotiable paper be indorsed and delivered to a bank for collection, and that bank send it to another bank, also for collection, but without notice that it does not own it, the latter bank may retain it and its proceeds to satisfy a claim for a general balance against the former, if that balance has been allowed to arise and remain on the faith of receiving payment from such collections, pursuant to a usage between the two banks. *Metropolis Bank v. New England Bank*, 1 How. 234; *Metropolis Bank v. New England Bank*, 6 How. 219.

6. Where a bank makes advances to aid the prosecution of a suit against the government under an agreement that it shall be paid out of any receipts, it has no right, where the suit, although prosecuted, results in an adverse judgment, to a fund recovered by a subsequent suit which it refuses to aid, prosecuted under a special resolution of congress by means of aid from other parties. *Washington Bank v. Nock*, 9 Wal. 373.

7. Where a customer of a bank deposited therewith, to secure his current indebtedness on discounts, the note of a third person secured by mortgage, and the bank permitted him to withdraw it in order to enforce payment, he promising to return the proceeds or other securities of equal value, and he foreclosed the mortgage, bid in the property, and deposited the title deed thereof with the bank, with which his dealings were then suspended, he owing nothing, and he afterwards renewed his relations with the bank, and became bankrupt while in debt to it, it was held, it not appearing that credit had been given him in reliance on the deed, that even if the deposit of a deed might be equivalent to an equitable mortgage, the facts gave the bank no right to claim one. *Biebinger v. Continental Bank*, 99 U. S. 143.

8. An insurance broker has a lien on the policy for the premium paid, and if he part with possession of the policy the lien will revive if the policy come again into his hands, unless from the manner of parting it appear that he intended to abandon his lien, an intermediate assignee taking *cum onere*. *Spring v. South Carolina Insurance Co.*, 8 Wheat. 268.

9. But in the case of other liens, if the policy be assigned, *bona fide*, for a valuable consideration, while out of the possession of the person having the lien, and afterwards come into his hands, the lien will not revive as against the assignee. *Ib.*

10. An agreement to give a lien on drafts to be drawn for the proceeds of a contract will not give a lien on a judgment for damages for its violation. *Washington Bank v. Nock*, 9 Wal. 373.

11. Although a statute regulating liens of sub-contractors on land requires, among other things, the presentation to the owner of the land of the original contractor's certificate of settlement between himself and the sub-contractor, the mere

**LIEN — continued.**

failure to present such certificate, other steps being properly taken, does not destroy the lien nor affect its priority. *Brooks v. Burlington & Southwestern Railway Co.*, 101 U. S. 443.

12. Under a statute, such as that of Utah, giving a lien on a mine to one "who shall perform any work or labor" thereon, a foreman who directs and oversees the workmen is entitled to a lien. *Flagstaff Silver Mining Co. v. Cullins*, 104 U. S. 176.

13. A statute, to confer a lien on the *corpus* of a railroad, good as against mortgagees and incumbrancers, in virtue of a credit advanced, must express in terms not doubtful an intention to give such lien; and the fact that if it do not so operate it will be but declaratory of the common law, will not lead to that construction, if it would also result in giving a lien where the parties have declined to take one in ordinary form and have taken a pledge of stock in lieu thereof, as by the statute they might. *Cincinnati v. Morgan*, 3 Wal. 275.

14. A lien for work done on a railroad which would attach to the whole road in preference to a mortgage afterwards placed on it, were the road built uninterruptedly under one contract, is not to be postponed to the mortgage because the different sections of the road were built under distinct contracts at different times, the road being, for all other purposes, including that of the mortgage, an entirety and a unit. *Brooks v. Burlington & Southwestern Railway Co.*, 101 U. S. 443; *Meyer v. Hornby*, Id. 728.

15. The lien given by the Illinois statute on the property of a railroad corporation to one who has furnished supplies, labor, etc., is not waived by a stipulation reserving a specific lien on the materials furnished; nor is it waived by an agreement to give credit for a period beyond that within which suit must be brought to enforce the statutory lien, such credit being offered on condition that security shall be given, and security not being given; nor is such a lien lost unless recorded, the recording acts having no application to this class of liens. *Chicago & Alton Railroad Co. v. Union Rolling Mill Co.*, 109 U. S. 702.

16. Where a receiver of a railroad, pending proceedings for a foreclosure, is authorized by the court to borrow money and issue certificates of indebtedness to be a lien on the property prior to the mortgage, and to dispose of them at no greater than a certain discount, a lender on such certificates has a lien for the money actually advanced less that discount. *Swann v. Wright*, 110 U. S. 590; *Swann v. Clark*, Id. 602.

17. No one can acquire a lien through his own illegal or fraudulent act, or breach of duty; nor can a lien arise where it would be inconsistent with the terms of the contract or the clear intent of the parties. *Randel v. Brown*, 2 How. 406.

**LIEN — continued.**

18. One cannot avail himself of a lien the discharge of which he has fraudulently prevented. *Carey v. Brown*, 92 U. S. 171.

19. A release fraudulently obtained from one of two joint contractors will not invalidate a lien for work which has already attached. *South Fork Canal Co. v. Gordon*, 6 Wal. 561.

20. The jurisdiction of a court of equity, invoked to enforce a statutory lien, rests upon the statute, and cannot extend beyond it. *Ib.*

*Banker's Lien on Deposits for Advances — Trust-money.*

See TRUST — CESTUI QUE TRUST, 11-13.

*Banker's Lien on Stock of Bank's Debtor.*

See BANK, 13-15.

*Bankruptcy — How it affects.*

See BANKRUPTCY — PRIOR TRANSACTIONS.

*Carrier's Lien — In general.*

See CARRIER — LIEN.

*Contract Lien on Enemy's Property not good against Captor.*

See CAPTURE — LAWFUL PRIZE, 30, 31.

See also CAPTURE — CAPTOR'S RIGHTS, ETC., 2, 3.

*Duties — United States.*

See DUTIES — ASSESSMENT, 48 et seq.

*Enemy's Property — Lien in Prize Proceedings — Affirmatively shown.*

See PRIZE — PRACTICE, 43.

*Execution — When a Lien.*

See EXECUTION, 23 et seq.

*Government Lien on Distilled Spirits for Internal Revenue Tax.*

See INTERNAL REVENUE — PERSONS AND THINGS TAXED, 13.

*Judgment gives Lien on Debtor's Land, but the Lien is not a Right in the Land itself, but a Right to levy — When a Lien on Personality.*

See JUDGMENT — LIEN, 1 et seq.

*Judgment Lien in Virginia released by Levy of ca. sa.*

See EXECUTION, 50.

*Judgment of Circuit Court — When it creates.*

See CIRCUIT COURT — PRACTICE, 13.

*Landlord's Lien for Rent — Priority — Displacement by Sale.*

See LANDLORD AND TENANT, 28 et seq.

*Maritime Lien — In general.*

See MARITIME LIEN.

*Mechanic's Lien — Holder has Insurable Interest.*

See INSURANCE — FIRE, 7.

*Mechanic's Lien — In general.*

See MECHANIC'S LIEN.

*Mechanic's Lien — Sale in Proceedings to enforce, instituted pending Proceedings in Federal Court to enforce a Forfeiture.*

See COURT — IN GENERAL, 58.

**LIEN — continued.**

*Mortgage — Railroad Mortgage in general.*

See RAILROAD — MORTGAGE.

*Mortgage Lien — In general.*

See MORTGAGE.

*Owner's Lien on Cargo — When waived.*

See CHARTER-PARTY, 24.

*Property confiscated — Liens not divested.*

See CONFISCATION, 35.

*Purchaser's Lien for Outlay instead of Specific Performance — When Equity will give.*

See SPECIFIC PERFORMANCE, 70.

*Salvage Service — In general.*

See SALVAGE.

*Seamen's Lien for Wages — Slave Trade affecting — Forfeiture.*

See SHIPPING — SEAMEN, 2-4.

*Seller of Personality, for Purchase-money.*

See SALE — SELLER'S LIEN.

*Seller's Lien for Purchase-money — Lost by Delivery.*

See SALE — WHAT CONSTITUTES, 40.

*Statute Lien on Railroad in Favor of Laborers, etc. — Merger by Judgment.*

See JUDGMENT — MERGER, 1.

*Taxes — Lien therefor not displaced by Sale under Prior Judgment.*

See TAX — COLLECTION, 20.

*Vendor's Lien for Purchase-money.*

See VENDOR AND PURCHASER — VENDOR'S LIEN.

*Vessel — Purchaser from Master, etc. — Takes clear of Liens.*

See SHIPPING — OWNERSHIP, 3.

*Vessel for Advances constitutes Insurable Interest.*

See INSURANCE — MARINE, 3.

*Vessel for Supplies or Repairs — Master may create — When.*

See SHIPPING — MASTER, 14 et seq.

**LIGHT-HOUSES — Secretary of the Treasury — Purchase of Supplies.**

See TREASURY DEPARTMENT.

**LIFE ESTATE — In general.**

See DEVISE AND LEGACY.

*Nothing more passed by Confiscation Proceedings.*

See CONFISCATION, 42 et seq.

*Power of Alienation not a Necessary Incident.*

See *Nichols v. Eaton*, 91 U. S. 716.

**LIFE INSURANCE — In general.**

See INSURANCE — LIFE.

**LIMITATION — Adverse Possession in general.**

See LIMITATION — ADVERSE POSSESSION.

*Exceptions and Interruptions, in general.*

See LIMITATION — EXCEPTIONS AND INTERRUPTIONS.

**LIMITATION — continued.**

*Particular Cases — Rules therein, etc.*

See **LIMITATION — PARTICULAR CASES.**

*Particular Courts — Rules therein, etc.*

See **LIMITATION — PARTICULAR COURTS.**

*Pleading and Practice under the Statutes.*

See **LIMITATION — PLEADING AND PRACTICE.**

*Running of Statute — When it begins — Runs against whom.*

See **LIMITATION — STATUTES.**

*Statutes, Validity and Construction.*

See **LIMITATION — STATUTES.**

**LIMITATION — ADVERSE POSSESSION — What constitutes Adverse Possession — Possession under Claim of Right — Constructive Possession, Ouster, etc.**

See pl. 1-31.

*Presumption of Grant — What justifies — Miscellaneous Matters.*

See pl. 32-42.

*Who may or may not acquire Adverse Possession.*

See pl. 43-56.

*Color of Title — What constitutes — What gives.*

See pl. 57-71.

*Continuity of Possession — How broken — Suit — Forfeiture.*

See pl. 72-74.

*Time necessary to constitute a Bar — Various Statutes.*

See pl. 75-84.

1. — *What constitutes Adverse Possession — Possession under Claim of Right — Constructive Possession, Ouster, etc.* Possession under a claim of the fee is evidence *prima facie* of ownership and seisin; but mere possession, unaccompanied by circumstances showing the extent and quality of the interest claimed, is evidence of no more than the bare fact of present occupation by right. *Ricard v. Williams*, 7 Wheat. 59.

2. Although a disseisor cannot, in qualification of his own wrong, assert, as against his disseisee, that he is other than a disseisor in fee, yet, upon the question whether one is in by title, presumed from long possession to have been made to him by the owner, the claims by which possession is accompanied are material. *Ib.*

3. It is necessary to a disseisin in fee that the entry be without right; if the entry be congeable, or the possession lawful, the entry and possession will be considered as limited by the right. *Ib.*

4. Although enclosure is one of the acts from which an intention to assert ownership and exercise possession may be inferred, there may be a possession without it. *Ellicott v. Pearl*, 10 Pet. 413.

**LIMITATION — ADVERSE POSSESSION — continued.**

5. The making of a fence or other improvement is not essential to an adverse possession; any visible and notorious acts of ownership under claim of right are sufficient; and the nature of such acts must depend on the uses to which the land was fitted. *Ewing v. Burnet*, 11 Pet. 41.

6. Thus, the exclusive and notorious use of a valuable sandbank, by sale and use of the sand, such being the use to which the owner of the land would naturally put it, constitutes a legal adverse possession. *Ib.*

7. The uninterrupted payment of taxes for more than twenty-four years, held to be strong evidence of a claim of right. *Ib.*

8. If land be occupied and cultivated in such manner as the owners of such lands usually occupy and cultivate, the possession is adverse. *Reed v. Merrimac River Canals Proprietors*, 8 How. 274.

9. Entry and possession under a tax deed giving color of title are sufficient evidence of an adverse seisin under the statute. *Pillow v. Roberts*, 13 How. 472.

10. In Missouri, a purchase of land from an administrator, and possession for more than twenty years, will sustain a plea of the statute of limitations, in the absence of any special circumstances taking the case out of the statute. *Long v. O'Fallon*, 19 How. 116.

11. A step-father and guardian, who took from a third person and procured to be recorded a deed of land of which he took the profits, and parts of which he afterwards sold, was held to have a sufficient adverse seisin to set up the statute of limitations against his step-children and wards, who claimed in the right of their mother, who had owned the land and conveyed it to such third person. *Mercer v. Selden*, 1 How. 37.

12. In an action on the case for obstruction in the use of a wharf, possession by the defendant under color and with claim of title will put the plaintiff to proof of a better title or of an equal right to the use. *Linthicum v. Ray*, 9 Wal. 241.

13. A parol agreement between the owners of adjoining lands to employ a surveyor to run the dividing line and so to establish it, will conclude the parties, if executed and if corresponding possession be had thereunder for twenty years. *Boyd v. Graves*, 4 Wheat. 513.

14. What is adverse possession of land is a question of law. *Bradstreet v. Huntington*, 5 Pet. 402.

15. If one with title enter upon land, his seisin becomes coextensive with his title. *Green v. Luer*, 8 Cranch, 229.

16. If without title, his seisin will be confined to his possession by metes and bounds. *Ib.*; *Clarke v. Courtney*, 5 Pet. 319.

17. But if one have title to land in the seisin of several tenants who claim different parcels in

**LIMITATION — ADVERSE POSSESSION — continued.**

severalty, an entry into one will not give seisin of the others; there must be an entry into each. *Green v. Liler*, 8 Cranch, 229.

18. An actual entry on part of a tract gives a constructive seisin coextensive with title. *Barr v. Gratz*, 4 Wheat. 213; *Clarke v. Courtney*, 5 Pet. 319; *Müller v. McIntyre*, 6 Pet. 61; *Ellicott v. Pearl*, 10 Pet. 412; *Hunnicut v. Peyton*, 102 U. S. 333.

19. But not if any part be in the actual possession of one having a better title. *Barr v. Gratz*, 4 Wheat. 213; *Clarke v. Courtney*, 5 Pet. 319; *Hunnicut v. Peyton*, 102 U. S. 333.

20. In such case the seisin of him having the better title extends to all not actually occupied by the other. *Ib.*

21. An entry without title works a disseisin of only so much as is actually thereby occupied. *Barr v. Gratz*, 4 Wheat. 213.

22. An owner of land in possession of a part has constructive possession of the residue, except so far as it is in actual possession of another. *Hunt v. Wickliffe*, 2 Pet. 201.

23. A possession under a junior patent which interferes with a senior patent, the lands being wholly unoccupied by any one claiming under the latter, extends by construction to the whole tract. *Sicard v. Davis*, 6 Pet. 124.

24. Where grants of adjoining tracts overlap, there can be no constructive possession under the junior grant of that part of the land that lies within the senior grant: to give effect to the statute there must be actual possession thereof. *White v. Burnley*, 20 How. 235.

25. If one claiming under a patent reside on the legal subdivision therein described, his residence will constitute possession of the whole, within the statute, and it will make no difference that he has laid it out into town lots. *Gregg v. Forsyth*, 24 How. 179; *Dredge v. Forsyth*, 2 Black, 563; *Kellogg v. Forsyth*, 2 Black, 571.

26. Where several adjoining tracts of wild land were surveyed in a body, with nothing on the ground to distinguish one tract from another, and conveyed to a purchaser by the state as an entirety by a single deed, and a subsequent grantee of them as a whole afterwards mortgaged them as a whole, it was held that a tenant whom the mortgagee had put in possession was in possession of the whole in right of the mortgage, although his actual possession did not extend beyond a single tract. *Brobst v. Brock*, 10 Wal. 519.

27. An ouster cannot be presumed in favor of possession by a mere intruder. *Society for Propagation of the Gospel v. Pawlet*, 4 Pet. 480.

28. Although the purchaser derives his title from his vendor, his possession, being for himself, ousts the vendor. *Ib.*

29. An entry is an ouster or not, according to the intent with which it is made; if under

**LIMITATION — ADVERSE POSSESSION — continued.**

claim or color of right it is an ouster, otherwise a trespass only. *Ewing v. Burnet*, 11 Pet. 41.

30. If a widow by mistake receive to her sole use rents which belong to herself and her children jointly, it does not oust the children. *Reed v. Merrimac River Canals Proprietors*, 8 How. 274.

31. Although in case of trespass the owner may elect to consider himself disseised, the wrong-doer who asserts an ouster of the owner must prove it, and something more than a mere trespass. *Clarke v. Courtney*, 5 Pet. 319.

32. — *Presumption of Grant — What justifies — Miscellaneous Matters.* The length of time necessary to bring a case within the legal presumption of a grant, charter, or license, to validate a right long enjoyed, is not definite, but depends on its peculiar circumstances. *Müchel v. United States*, 9 Pet. 711.

33. Circumstances may justify the presumption of a grant, although the adverse possession be not such as would constitute a bar under the statute of limitations. *Ewing v. Burnet*, 11 Pet. 41.

34. In favor of long possession it is to be presumed that everything that has been done has been done rightfully, and that whatever was necessary to be done has been done. *Strother v. Lucas*, 12 Pet. 410.

35. The deposit of earth on a water lot, below high-water mark, to fit it for occupation and use, followed by the erection of a wharf and warehouse thereon, with possession of the adjacent upland for more than forty years, held strong ground for presumption of title. *Watkins v. Holman*, 16 Pet. 25.

36. The presumption of a grant, arising from lapse of time, applies to land as well as to incorporeal hereditaments; but if, in the circumstances, the possession be consistent with the presumption that an estate less than a fee was the cause of it, a fee will not be presumed. *Ricard v. Williams*, 7 Wheat. 59.

37. A legatee in the adverse possession of land alleged to belong to the estate of the testator, cannot be compelled to allow rent therefor by way of set-off to his legacy, there being no implication of an assumpsit in such a case, and the right to the land not standing for trial in such a collateral manner. *West v. Smith*, 8 How. 402.

38. To show the nullity of a conveyance executed by one out of possession, adverse possession may be set up against any title. *Bradstreet v. Huntington*, 5 Pet. 402.

39. A purchaser without notice may join his adverse possession with the ostensible adverse possession of his grantor to make a bar under the statute. *Alexander v. Pendleton*, 8 Cranch, 462.

40. Under the Kentucky statute, as under the English, the whole possession must be taken

**LIMITATION — ADVERSE POSSESSION — continued.**

together. Thus, adverse possession under a survey, previous to its being carried into grant, must be connected with continued subsequent possession. *Walden v. Gratz*, 1 Wheat. 292.

41. Under the Texas statute of 1841, if the possession of two or more persons in succession, holding in privity with one another, under title or color of title, make out the prescribed term, the bar is complete. *Christy v. Alford*, 17 How. 601.

42. So under the Tennessee statute. *Lea v. Polk County Copper Co.*, 21 How. 493.

43. — *Who may or may not acquire Adverse Possession.* An heir may enter and claim by title other than that of his ancestor, and by exclusive possession under such claim acquire a title valid as against his co-heirs and creditors. *Ricard v. Williams*, 7 Wheat. 59.

44. Or, entering as heir, he may afterwards disavow his co-heirs, with a like result. *Ib.*

45. The grantee of one who has only an equitable right, but who undertakes to convey the fee, or of a tenant in common who undertakes to convey the whole, may, if in possession under a claim to the whole, set up his possession as a bar under the statute. *Bradstreet v. Huntington*, 5 Pet. 402.

46. The possession of a mortgagor is not adverse to that of the mortgagee. *Higginson v. Min*, 4 Cranch, 415; *Union Bank v. Stafford*, 12 How. 327; *New Orleans Canal & Banking Co. v. Stafford*, 12 How. 343.

47. A possession by a tenant inures to the benefit of the landlord. *Gregg v. Forsyth*, 24 How. 179.

48. If one who enters on vacant land without claim of title afterwards attorn to the holder of a legal title, his possession is by relation a possession for his landlord from the time of entry. *Peyton v. Stith*, 5 Pet. 485.

49. If the purchaser of an undivided part of a parcel of land, having but an equitable title, enter upon the whole, under such title, the holder of the legal title will thereby acquire an actual seisin, the possession being under his title. *Barr v. Gratz*, 4 Wheat. 213.

50. Ejectment against the holder of manorial land in Pennsylvania, under a conditional warrant, to enforce payment of the purchase-money, held not barred by the statute of limitations of 1705, nor by that of 1785, for that such holding was not adverse. *Kirk v. Smith*, 9 Wheat. 241.

51. Possession, to constitute a bar, must have been actual, continued, and adverse; and possession by a third person will not avail the defendant if he do not connect himself with it. *Doswell v. De la Lanza*, 20 How. 29.

52. One in possession, without title, cannot maintain an action against one who enters under an apparently valid title from the United States. *Burgess v. Gray*, 16 How. 48.

53. Where a patent issued on a proper entry contained a reservation of the rights of persons

**LIMITATION — ADVERSE POSSESSION — continued.**

claiming under the act of March 3, 1823 (3 Sts. 786), to confirm claims for lots in Peoria, the reservation was held not to prevent the statute from running in favor of the patentee as against the right of one claiming a part of the land under that act and a survey thereunder. *Meehan v. Forsyth*, 24 How. 175.

54. Such a reservation cannot be construed as recognizing a superior title to any part of the land, nor prevent the possession from being adverse. *Ib.*

55. In Virginia, possession under an entry, without either title or claim or color of title, is not adverse to the paramount title, but subervient thereto. *Harvey v. Tyler*, 2 Wal. 328.

56. If one enter in privity with the owner, the statute will not begin to run until there is a clear, positive, and open disavowal of the owner's title brought home to the owner's knowledge. *Zeller v. Eckert*, 4 How. 289.

57. — *Color of Title — What constitutes — What gives.* Color of title is that which in appearance is title, but in reality is not. *Wright v. Mattison*, 18 How. 50.

58. Whenever an instrument, by apt words of transfer, in form passes what purports to be the title, it gives color of title, whether the grantor acts under the authority of judicial proceedings, or otherwise. *Hall v. Law*, 102 U. S. 461.

59. Whether a United States patent conveys a valid title or not, if the patentee is in possession under it, he is in possession under color of title, and his possession, therefore, may be adverse within the statute of limitations. *Bicknell v. Comstock*, 113 U. S. 149.

60. A tax title not fatally defective on its face may constitute color of title. *Wright v. Mattison*, 18 How. 50.

61. It is not a necessary legal inference that one in possession of land, claiming title, cannot acquire color of title by purchasing in good faith at a tax sale thereof. *Ib.*

62. The statute will protect an innocent grantee who enters and claims under a grant fraudulent on the part of the grantor. *Gregg v. Sayre*, 8 Pet. 244.

63. In Tennessee, possession under a deed for the statute period is sufficient, although the deed be unrecorded and void. *Lea v. Polk County Copper Co.*, 21 How. 493.

64. The words, "want of intrinsic fairness and honesty," in section 15 of the Texas statute of limitations, relate to defects in the claim of title set up as color of title, and not to knowledge in the defendant of the existence of a superior title. Thus, the statute may run when there is possession under a junior title, although the elder title is on record. *Davila v. Mumford*, 24 How. 214.

65. A patent reserving the rights of all persons who may perfect a superior right by a survey under a prior statute is sufficient color of

**LIMITATION — ADVERSE POSSESSION — continued.**

title for the Illinois seven years' statute, and the time will run from the date of such survey. [McLEAN, J., dissenting.] *Bryan v. Forsyth*, 19 How. 334; *Gregg v. Tesson*, 1 Black, 150; *Dredge v. Forsyth*, 2 Black, 563; *Kellogg v. Forsyth*, 2 Black, 571.

66. In Louisiana, mere conveyance from one out of possession under a subsisting contract passing title to another on a condition subsequent, of which there has been no breach, will not give a possession with which a prescription as against the first grantee may begin. *Anderson v. Bock*, 15 How. 323.

67. Under that provision of the Texas statute limiting actions to recover real estate from persons in possession under title or color of title to three years, there is no color of title when there is not merely a defect in the link of the chain, but a link actually wanting. *League v. Atchison*, 6 Wal. 112; *Osterman v. Baldwin*, Id. 116.

68. A certificate from a vendor of land stating the purchase, and acknowledging payment and the right of the purchaser to a conveyance as soon as the vendor is prepared to execute one, not purporting in itself to convey, is not a link in a chain for the purpose of color of title, within the meaning of that statute. *Osterman v. Baldwin*, 6 Wal. 116.

69. The Illinois statute of 1835, which makes seven years' possession of land a bar in favor of one having a connected title deducible from a public officer authorized to sell "such land for non-payment of taxes," does not protect a claimant under a deed void on its face for want of compliance with the requirements of the law, such compliance being necessary to confer authority to sell. [TANEY, C. J., and CATRON and GRIER, JJ., dissenting.] *Moore v. Brown*, 11 How. 414.

70. A sheriff's deed which is void for want of jurisdiction in the court under whose judgment the sale took place does not confer color of title. *Walker v. Turner*, 9 Wheat. 541.

71. Possession under a deed for an undivided half is not such an adverse possession of the whole as will avoid a deed by a grantor out of possession. *Noonan v. Lee*, 2 Black, 499.

72. — *Continuity of Possession — How broken — Suit — Forfeiture.* In Tennessee, the running of the statute can be stopped only by actual suit, if the person claiming under it have peaceable possession. *McClung v. Ross*, 5 Wheat. 116.

73. But such possession does not exist if the person having the better right enter pursuant thereto. *Ib.*

74. The continuity of an adverse possession is broken, as matter of law, by a forfeiture of the land to the state for non-payment of taxes, although the owner is by a subsequent statute permitted to redeem, so that, although the possession is in fact continuous, neither the time of

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possession prior to the forfeiture, nor the time during which by the forfeiture the title is in the state, can be reckoned as part of the limitation period. [DAVIS, STRONG, and BRADLEY, JJ., dissenting.] *Armstrong v. Morrill*, 14 Wal. 120.

75. — *Time necessary to constitute a Bar — Various Statutes.* An adverse possession of fifty years, although with knowledge of a better title, is a bar to that title. *Alexander v. Pendleton*, 8 Cranch, 462.

76. A continuous, uninterrupted, adverse possession for the time limited by the statute, not only bars the remedy, but extinguishes the right, and vests a perfect title in the adverse holder. *Bicknell v. Comstock*, 113 U. S. 149.

77. Uninterrupted, open, visible, exclusive, and notorious adverse possession of land in the District of Columbia for twenty years under a claim of title affords a good defence to an action of ejectment. *Hogan v. Kurtz*, 94 U. S. 773.

78. In North Carolina, proof of possession under title for seven years or more raises a presumption that the adverse claim is barred under the statute, and, in the absence of evidence of disability on the part of the claimant, it is conclusive against the existence of a paramount adverse title. *Somerville v. Hamilton*, 4 Wheat. 230.

79. In Tennessee, a possession of seven years is a bar under the statute of 1797, explaining the North Carolina statute of 1715, only when held under a grant, or a deed founded on a grant. *Patton v. Easton*, 1 Wheat. 475; *Walker v. Turner*, 9 Wheat. 541; *Powell v. Harman*, 2 Pet. 241. Overruled in *Green v. Neal*, 6 Pet. 291, to conform to the decisions of the state court. [BALDWIN, J., dissenting.]

80. Under that statute peaceable and uninterrupted adverse possession for seven years, under a grant or a deed founded on a grant, gives a perfect title to land. *Piles v. Bouldin*, 11 Wheat. 325; *Lea v. Polk County Copper Co.*, 21 How. 493.

81. In Kentucky, twenty years' adverse possession will bar an equitable as well as a legal title. *Lewis v. Marshall*, 5 Pet. 470; *Peyton v. Stith*, Id. 485.

82. In California, continuous adverse possession for five years bars an action of ejectment, if the plaintiff or those under whom he claims were under no disability when the cause of action first accrued. *Harris v. McGovern*, 99 U. S. 161.

83. The Georgia statute of limitations of 1767 does not require an entry within seven years after the title accrued, unless there is an adverse possession. *Shearman v. Irvine*, 4 Cranch, 367.

84. In Kentucky, the heirs of a non-resident patentee have ten years after the death of their ancestor in which to assert their claim against an

**LIMITATION — ADVERSE POSSESSION — continued.**

adverse possession taken in his lifetime. *Lewis v. Marshall*, 5 Pet. 470.

*Ejectment on Patent — Prior Adverse Possession.*

See LANDS OF UNITED STATES — CONFLICTING CLAIMS, 48.

*Entry and Possession by a Tenant in Common.*

See TENANTS IN COMMON.

*Equity — Possession, when a Bar.*

See EQUITY — LACHES AND LIMITATION, 5 *et seq.*

*Ground of Error to State Court.*

See ERROR TO STATE COURT — JURISDICTION, 24.

*Statute begins to run, when.*

See LIMITATION — STATUTES, 19 *et seq.*

*United States — None against.*

See UNITED STATES — LIMITATION, 3.

**LIMITATION — EXCEPTIONS AND INTERRUPTIONS — In general — Coverture — Running of Statute against Husband.**

See pl. 1-4.

*Absence — Beyond the Seas — What brings one within the Exception.*

See pl. 5-9.

*Legal Proceedings — What sufficient to interrupt the running of the Statute.*

See pl. 10-27.

*Merchants' Accounts — What within the Exception.*

See pl. 28-33.

*Fraudulent Concealment of Cause of Action.*

See pl. 34, 35.

*Trusts — What Trusts barred — Express and Constructive Trusts.*

See pl. 36-49.

*War — Suspension during War — Rebellion.*

See pl. 50-56.

*Disability, in general — What constitutes, etc.*

See pl. 57-67.

*New Promise, Acknowledgment, Part Payment — What constitutes — Effect, etc.*

See pl. 68-82.

1. — *In general — Coverture — Running of Statute against Husband.*] Where a statute, like that of Arkansas, limiting the time within which demands must be exhibited to the executor or administrator, makes no exception as to non-residents, persons under disability, etc., no exception can be made. *Morgan v. Hamlet*, 113 U. S. 449.

2. In Massachusetts, a married woman's right of entry is barred after thirty years, notwithstanding her coverture. *Reed v. Merrimac River Canals Proprietors*, 8 How. 274.

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3. In Missouri, the statute does not run against a married woman during her coverture, and she may have an action of ejectment within twenty years after becoming discoverd. *Meegan v. Boyle*, 19 How. 130.

4. If title be cast by descent on a *feme covert*, the statute will begin to run against the husband, so that if the husband and wife convey at any time during the statute period, their grantee will be barred on the expiration thereof during the lifetime of the husband. *Gregg v. Tesson*, 1 Black, 150.

5. — *Absence — Beyond the Seas — What brings one within the Exception.*] A removal from the county, which does not in fact obstruct an action, is not within the exception in section 14 of the Virginia statute of limitations. *Wilson v. Koontz*, 7 Cranch, 202.

6. Under a Virginia statute saving the rights of creditors "out of the commonwealth," for three years after removal of the disability so arising, the statute does not begin to run from the coming in of the creditor for a temporary purpose, if the debtor be not then a resident so that he can be sued. *Faw v. Roberdeau*, 3 Cranch, 174.

7. The term "beyond seas," in the proviso of the statute of limitations of Georgia, is equivalent to the words "without the limits of the state." *Murray v. Baker*, 3 Wheat. 541.

8. A foreign corporation, all of the members of which are beyond seas, is within the exception to the statute. *Society for Propagation of the Gospel v. Pawlet*, 4 Pet. 480.

9. A resident in that part of the District of Columbia which was ceded by Virginia, held not "beyond seas" as to the part which was ceded by Maryland, within the meaning of those words in the Maryland statute, those two parts not standing in the relation of different states. *Alexandria Bank v. Dyer*, 14 Pet. 141.

10. — *Legal Proceedings — What sufficient to interrupt the running of the Statute.*] The statute cannot begin to run on a right of action on a marshal's bond for neglect to pay over the proceeds of an execution while proceedings in the cause are suspended by an appeal. *Montgomery v. Hernandez*, 12 Wheat. 129.

11. On voluntary abandonment of a suit, the statute runs from accrual of the original cause of action as against a second suit. *Richards v. Maryland Insurance Co.*, 8 Cranch, 84.

12. The *cestui que use* under the statute of uses does not claim under or through the devisee to use, within the meaning of the South Carolina statute of 1744, which allows a plaintiff in ejectment, or one claiming under or through him, two years after action let fall in which to begin *de novo*. *Henderson v. Griffin*, 5 Pet. 151.

13. In ejectment by the *cestui que use*, the plaintiff was ordered to pay the costs of a prior



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ejectment in the name of the devisee to uses, there being no adjudication of a connection between the two suits such as to take the case out of the statute. *Ib.*

14. An amended bill bringing in new parties cannot have effect, by relation, as of the time of the filing of the original bill, for the purpose of stopping the running of the statute as against such parties; the statute will continue to run in their favor until they are brought in. *Miller v. M'Intyre*, 6 Pet. 61.

15. So, if a new title be set up by way of an amendment to the bill, the statute will continue to run until the amendment is filed. *Holmes v. Trout*, 7 Pet. 171.

16. If the plaintiff in ejectment amend his declaration by inserting a count laying a demise from a different lessor, the statute continues to run as against such new title to the time of the making of the amendment. *Sicard v. Davis*, 6 Pet. 124.

17. In Virginia, a *sci. fa.* against the executor of the judgment debtor and an execution by virtue thereof will not bring the case within the exception of judgments on which executions have issued. *Deneale v. Archer*, 8 Pet. 526.

18. Where an agent, holding money of his principal, is attached as garnishee, the attachment proceedings, while pending, are pleadable in abatement of a suit by the principal, so that during the pendency of such proceedings the statute does not run against the principal. *Mattingly v. Boyd*, 20 How. 128.

19. In Louisiana, on a plea of the statute, the running of the statute will be deemed to have been interrupted by a suit embracing a portion of the matter in controversy. *Martin v. Ihmsen*, 21 How. 394.

20. In Louisiana, a prescription is interrupted by calling one in possession before a court of justice, whether one of competent jurisdiction or not, and is not set running again except by an intentional abandonment of the suit, as possession afterwards cannot be in good faith. *Gaines v. Hennen*, 24 How. 553.

21. An order for seizure and sale of mortgaged property, in Louisiana, interrupts the prescription of the personal action on the notes, even if the sale is adjudged void for irregularity. The order remains in force. *Gordon v. Gilfoil*, 99 U. S. 168.

22. A statute of limitations which, like that of Tennessee, contains a saving clause permitting a second suit where judgment has been rendered against the plaintiff in the first one on a ground not concluding his right of action, permits a second suit where the first one was dismissed for want of jurisdiction because of the lack of an averment of a jurisdictional fact. *Smith v. McNeal*, 109 U. S. 426.

23. Where one sues on a claim which has

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been sold by his assignee in bankruptcy, and bought by another for the plaintiff's use, the transfer to the plaintiff being made, however, after suit brought, the case is not within an exception in a statute of limitations which, like that of Mississippi, permits a second suit to be brought after the time when, but for the exception, the bar of the statute would be complete, if the first suit has failed "for matter of form." The failure is for matter of substance. *Meath v. Mississippi Levee Commissioners*, 109 U. S. 268.

24. Where, as by the act of July 13, 1866 (14 Sts. 152), an action to recover back an internal revenue tax illegally assessed is prohibited until an appeal to the commissioner shall have been taken and decided, the operation of a state statute of limitations is suspended during the pendency of such appeal, but only during that time. If there is a delay in appealing, the state statute runs during the time of delay. *Braun v. Sauerwein*, 10 Wal. 218.

25. The California statute of limitations could not run against the right of a claimant of land in California under a Mexican grant while proceedings for the confirmation of his claim were pending before federal tribunals, under legislation imposing on him the burden of thus presenting his claim for investigation. *Henshaw v. Bissell*, 18 Wal. 255.

26. When the charter of a bank gives the bank, for the collection of debts, a right to a summary process in advance of judgment, with a right to the debtor to make defence on return of the process, the issuing of the process is the beginning of the action, for the purpose of stopping the running of the statute of limitations. *Columbia Bank v. Sweeney*, 2 Pet. 671.

27. In Louisiana, the acknowledgment by an executor of a debt against the estate, and the ranking of it by the probate judge as required by the code, suspend prescription. *Johnson v. Waters*, 111 U. S. 640.

28. — *Merchants' Accounts — What within the Exception.* The exception of merchants' accounts in the statute of limitations of Virginia applies to actions of assumpsit as well as to actions of account. *Mandeville v. Wilson*, 5 Cranch, 15.

29. It is not necessary that any item of an account should come within the five years to bring the account within the exception of merchants' accounts in the Virginia statute. *Ib.*

30. To come within the exception of merchants' accounts, an action on the case must be founded on an account between merchants which concerns the trade of merchandise. *Spring v. Gray*, 6 Pet. 151.

31. A contract of charter-party on half profits is not within the exception, although between merchants. *Ib.*

32. To come within the exception, the account must be open; for, when the account becomes

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stated, the statute will begin to run. *Toland v. Sprague*, 12 Pet. 300; *Bispham v. Price*, 15 How. 162.

33. A demand cannot be regarded as an open account where there is a special contract which, although not fulfilled to the letter, is really the foundation of the demand, and determines the rights of the parties. *New Orleans, etc. Railroad Co. v. Lindsay*, 4 Wal. 650.

34. — *Fraudulent Concealment of Cause of Action.*] Where a defendant seeks to avail himself of the bar of the statute of limitations, and the plaintiff replies that the defendant fraudulently concealed from him knowledge of the cause of action, specific acts on the part of the defendant must be shown, and it must appear also that the plaintiff was not guilty of laches in discovering the acts relied on as fraudulent. *Wood v. Carpenter*, 101 U. S. 135.

35. And the rule is the same whether the suit is at law or in equity. *Mercantile National Bank v. Carpenter*, 101 U. S. 567.

36. — *Trusts — What Trusts barred — Express and Constructive Trusts.*] The statute does not begin to run on an express trust until the trust has been disavowed. *Boone v. Chiles*, 10 Pet. 177; *Seymour v. Freer*, 8 Wal. 202.

37. But a constructive trust, forced on a party as a remedy for a fraud, is, in general, barred by a lapse of twenty years after possession taken. *Boone v. Chiles*, 10 Pet. 177.

38. In general, length of time is no bar to a trust, clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief. *Prevost v. Gratz*, 6 Wheat. 481.

39. Mere lapse of time constitutes no bar to a bill to enforce a subsisting trust; and time begins to run against a trust only on an open disavowal by the trustee. *Oliver v. Piatt*, 3 How. 333.

40. An unexecuted trust for the payment of debts held, in the circumstances, not barred in equity by lapse of time. *United States v. Beverly*, 1 How. 134.

41. Within what time a constructive trust will be barred depends on circumstances. *Michoud v. Girod*, 4 How. 503.

42. A demand and refusal are necessary to put the statute in motion in favor of a trustee who has received money for his *cestuis que trust*. *Taylor v. Benham*, 5 How. 233.

43. When a purchaser goes into possession, the vendor is his trustee for the title, and his *cestui que trust* as to the purchase-money; and in special circumstances both trusts may be enforced after twenty years, without any special prayer for such relief. *Boone v. Chiles*, 10 Pet. 177.

44. One who holds in trust for his grantor cannot avail himself of the statute, although he

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holds by a deed which is on its face absolute. *Babcock v. Wyman*, 19 How. 289.

45. Where certain Canadian heirs of one who died in 1793, seised of land in Detroit, brought a suit in equity in 1857 against, and claiming as tenants in common with, other heirs who lived with their common ancestor at the time of his death, and who continued in possession until the suit was brought, and one of whom had obtained from congress a confirmation of title in himself and had obtained a patent, the case was held to depend on the establishment of an implied trust, and therefore to be one in which a court of equity would follow the courts of law in applying the statute of limitations. *Beaubien v. Beaubien*, 23 How. 190.

46. Where a trustee has closed his trust relation to the property and to the *cestui que trust*, and has parted with all control of the property, the statutes run in his favor, although the trust is an express one. *Clarke v. Boorman*, 18 Wal. 493.

47. A violation of trust growing out of a mistaken construction of a will by the executors, unaccompanied by fraudulent intent, is within the ten years statute of New York concerning actions for relief in cases of trust not cognizable by courts of law. *Ib.*

48. In Pennsylvania, a resulting trust in land, if not sought to be enforced for a period of twenty-one years, and not reaffirmed and continued, will, in general, be extinguished; and that rule is especially applicable where, during that period, the holder of the legal title has been in open and notorious adverse possession, paying the taxes and exercising all the usual rights of ownership, with his title on record in the proper office. *King v. Pardee*, 96 U. S. 90.

49. The right to enforce a vendor's lien under an agreement to sell, and a bond conditioned to convey on payment of the purchase-money, is not barred by statutes of limitation applicable to suits for the recovery of real estate. The relation between the parties to such an agreement is a trust relation to which such statutes have no application. *Lewis v. Hawkins*, 23 Wal. 119.

50. — *War — Suspension during War — Rebellion.*] The act of June 11, 1864 (13 Sts. 123), suspending the running of statutes of limitation in certain cases during the rebellion, is a valid exercise of power implied from the constitutional power to make war and suppress insurrections. *Stewart v. Kahn*, 11 Wal. 493.

51. The statute of a state engaged in the rebellion did not run upon the demand of a citizen of a loyal state against a citizen of the state so engaged, while the courts of the state were closed against him. *Hanger v. Abbott*, 6 Wal. 532; *Levy v. Stewart*, 11 Wal. 244.

52. Nor upon the demand of a citizen of a state so engaged against a citizen of another state so engaged. *Ross v. Jones*, 22 Wal. 576.

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53. Nor upon a demand of the government, although the mere right of the government to sue, unlike that of the citizen, was not suspended, but only its ability. *United States v. Wiley*, 11 Wal. 508.

54. Statutes of limitation were suspended in the rebellious states during the period of the war. *Caperton v. Bowyer*, 14 Wal. 216; *Brown v. Hiatt*, 15 Wal. 177; *Adger v. Alston*, 15 Wal. 555; *Holdane v. Sumner*, 15 Wal. 600; *Batesville Institute v. Kauffman*, 18 Wal. 151.

55. The act of June 11, 1864 (13 Sts. 123), suspending the running of statutes of limitation in certain cases during the rebellion was not merely prospective: time already elapsed during which the course of justice had been impeded was to be computed in making deduction from the statute period. *Stewart v. Kahn*, 11 Wal. 493; *United States v. Wiley*, Id. 508.

56. The act applies to cases in state as well as to those in federal courts. *Stewart v. Kahn*, 11 Wal. 493.

57. — *Disability in general — What constitutes, etc.* The want of evidence to support a title does not constitute disability to sue. *McIver v. Ragan*, 2 Wheat. 25.

58. Assignment to the United States of a chose in action barred under the statute will not remove the bar. *United States v. Buford*, 3 Pet. 12.

59. The court cannot engraft exceptions on the statute on the ground that they are within the equity of exceptions therein expressed. *McIver v. Ragan*, 2 Wheat. 25. See *Alabama State Bank v. Dalton*, 9 How. 522.

60. In this country, the only disability available to the plaintiff under a statute of limitations is the one that existed when the right of action accrued. Thus, if an infant be disseised and then marry, she must bring suit within the period prescribed by the statute for infants who become of age, notwithstanding her coverture. *Mercer v. Selden*, 1 How. 37.

61. When the statute has once begun to run, no subsequent disability will stop it. *Harris v. McGovern*, 99 U. S. 161.

62. An agreement in writing, for a valuable consideration, to extend the time of payment of a note already payable, will suspend the running of the statute until the expiration of the extended term of credit. *Randon v. Toby*, 11 How. 493.

63. The saving clauses in the New York statute limiting writs of right do not allow for cumulative disabilities. *Thorp v. Raymond*, 16 How. 247.

64. That clause in the Missouri statute which saves the rights of the creditor where the debtor absconds or conceals himself, is available at law as well as in equity. *Gaines v. Miller*, 111 U. S. 395.

**LIMITATION — EXCEPTIONS AND INTERRUPTIONS — continued.**

65. The exception in the Maryland statute of accounts between non-resident merchants applies to dealings between a non-resident merchant creditor and a resident debtor. *Bond v. Jay*, 7 Cranch, 350.

66. To take a case out of the exception, it is not sufficient to aver that the creditor returned to and was within the state after the cause of action accrued, and more than three years before action brought: it is necessary to aver that he became a resident more than three years before action brought. *Ib.*

67. The treaty of peace with Great Britain of 1783 (8 Sts. 80) does not allow time previous to the war of the revolution to be added to time subsequent to the treaty, in order, under a statute of limitations, to create a bar to a debt due to a British subject not so barred at the beginning of the war. *Hopkirk v. Bell*, 3 Cranch, 454.

68. — *New Promise, Acknowledgment, Part Payment — What constitutes — Effect, etc.* If a new promise is to be raised by implication of law from an acknowledgment, it must be an unqualified acknowledgment of a subsisting debt that the party is liable and willing to pay. *Bell v. Morrison*, 1 Pet. 351; *Moore v. Columbia Bank*, 6 Pet. 86.

69. Thus, proof that the maker of a note that had been discounted at the bank was heard to say to a third person who congratulated him on being free from debt, "Yes, except one damned five hundred dollars in the Bank of Columbia, which I can pay at any time," and that there was only one of his notes then in the bank, does not amount to a new promise, nor to that from which one can be implied. *Moore v. Columbia Bank*, 6 Pet. 86.

70. *Semble* that inclusion of a demand in the schedule of debts filed by an insolvent is evidence of a new promise within the meaning of the statute of limitations. *Bowie v. Henderson*, 6 Wheat. 514.

71. An agreement "renewing and reviving" the debt, barred by the statute of limitations, gives no lien; it merely keeps alive the personal obligation. *Washington Bank v. Nock*, 9 Wal. 373.

72. Where a statute of limitations, like that of Kansas, provides that the acknowledgment, to be sufficient to take a case from the bar of the statute, must be in writing, and signed by the party to be charged thereby, such acknowledgment, to be effective, must be made, not to a stranger, but to the creditor, or to some one acting for or representing him. And although an acknowledgment need not amount to a new promise, it cannot be regarded as an admission of indebtedness, where the accompanying circumstances are such as to repel the inference that it was so intended, or such as to leave it in doubt whether the debtor intended to prolong the time of limitation. Where,

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therefore, a city, in submitting to its creditors a proposal concerning its indebtedness, placed in the list an item describing bonds on which, if sued, the city might have set up the bar of the statute, and sent the proposal to all its creditors except to those holding such bonds, and a creditor to whom the proposal was sent showed it to one holding such bonds, the city not intending to acknowledge its indebtedness on them, it was held that there was no acknowledgment within the meaning of the statute. *Fort Scott v. Hickman*, 112 U. S. 150.

73. An acknowledgment of the original justice of the claim is not sufficient to take the case out of the statute. *Clementson v. Williams*, 8 Cranch, 72.

74. There must be an unqualified and unconditional acknowledgment that the debt is due, in whole or in part. *Ib.*; *Wetzell v. Bussard*, 11 Wheat. 309.

75. A recital in a deed may be an admission of the existence of a debt sufficient to remove it from the operation of the statute. *King v. Riddle*, 7 Cranch, 168.

76. In Louisiana, a plea of prescription of one year will not avail where there has been an acknowledgment of the sum due on settlement within that time. *Newell v. Nizon*, 4 Wal. 572.

77. In Louisiana, under the statute of 1858, a parol acknowledgment of the debt will not take the case out of the statute where the debtor is dead, nor will an unsigned indorsement of part payment, the statute requiring the acknowledgment or promise to be in writing, and signed by the debtor or his agent. *Adger v. Alston*, 15 Wal. 555.

78. A letter from a mortgagor to the mortgagee, in answer to a letter asking for insurance as further security for the mortgage debt, and reciting the amount of it, which says that the mortgagor thinks the mortgagee will run no risk, as the property would be worth more than the amount due if the buildings were to burn, is a sufficient acknowledgment or promise to interrupt the running of a statute of limitations which, like the Mississippi statute, requires an acknowledgment or promise in writing. *Walsh v. Mayer*, 111 U. S. 31.

79. And where the debt is witnessed by a note made in the names of the several members of a firm, a letter signed in the firm name will suffice, if the debt was contracted for property for partnership use. *Ib.*

80. A declaration by an administrator that he has no funds to pay the debts of his intestate will not remove the bar of the statute of limitations to an action for such a debt. *Thompson v. Peter*, 12 Wheat. 565.

81. Payment of a sum admitted to be due, accompanied with denial of further indebtedness, cannot be deemed payment on account, implying a promise to pay the entire claim, and so taking

**LIMITATION — EXCEPTIONS AND INTERRUPTIONS — continued.**

it out of the statute. *United States v. Wilder*, 13 Wal. 254.

82. Prescription in Louisiana is interrupted either by payment of interest on a note or by a suit on it. *Cucullu v. Hernandez*, 103 U. S. 105.

*Acknowledgment by Partner after Dissolution will not remove Bar of Statute.*

See PARTNERSHIP, 83.

*Presentment — Claim against Government is so presented as to stop the running of the Statute when presented to a Department.*

See COURT OF CLAIMS — PRACTICE, 15.

*War — Suit by Lessor against Lessee — Property seized and held by Government during the War — Limitation a Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 150.

*War — Suits on Insurance Policies — Statute suspended by War.*

See INSURANCE — FIRE, 50.

**LIMITATION — PARTICULAR CASES — Abandoned and Captured Property Acts — Limitation thereunder.**

See ABANDONED AND CAPTURED PROPERTY, 32, 33.

*Actions on Foreign Judgments.*

See JUDGMENT — CONCLUSIVENESS, 20.

*Appeal from Court of Claims — When the Statute ceases to run.*

See APPEAL FROM COURT OF CLAIMS, 1.

*Claim for the Surplus Proceeds of Property sold under the Direct Tax Act of 1861 accrues on Application for Payment.*

See COURT OF CLAIMS — PRACTICE, 16.

*Conflict of Laws as affecting.*

See CONFLICT OF LAWS, 4, 5, 23 et seq.

*Defence — Not first made on Appeal or Error.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 290.

*Error to State Court — Writ, when brought.*

See ERROR TO STATE COURT — BRINGING AND PERFECTING, 4.

*Executor, etc. — Time within which he must or may sell for Payment of Debts.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 39-42.

*Foreclosure and Sale — Decree sets Statute running.*

See EQUITY — REVIEW, 27, 29.

*Petitions for Confirmation of Spanish or Mexican Grants of Lands.*

See LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS, 393 et seq.

*Proceedings to recover Usurious Interest.*

See USURY, 53 et seq.

**LIMITATION — PARTICULAR CASES — continued.**

*Redemption from Sale on Foreclosure.*  
See MORTGAGE — REDEMPTION, 4.

*State Statute Bar in Circuit Court in Action on Judgment in another State.*  
See JUDGMENT — CONCLUSIVENESS, 18 *et seq.*

*State Statutes Local Rules of Decision in Federal Courts.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 30 *et seq.*

*Suits for Acts done by Government Agents during the Rebellion.*  
See REMOVAL, 8.

*Suits against Collector of Internal Revenue for Tax illegally assessed — Claims for Remission of Taxes.*

See INTERNAL REVENUE — REMEDIES FOR ILLEGAL EXACTION, 14-17.

**LIMITATION — PARTICULAR COURTS — Admiralty — Application of Statutes in.**

See ADMIRALTY — PRACTICE, 90, 91.

*Bankruptcy — Suits by and against Assignee — Pleading.*

See BANKRUPTCY — PROCEEDINGS TO CONVERT ESTATE, 24 *et seq.*

*Equity — Application in.*

See EQUITY — LACHES AND LIMITATION.

*Equity — Bills of Review — Five Years.*

See EQUITY — REVIEW, 25, 26.

*Equity — Lapse of Time a Bar — Boundaries between States.*

See STATES — BOUNDARIES, 8.

**LIMITATION — PLEADING AND PRACTICE —**

*Law — Averments necessary — Demurrer — Judgment.*

See pl. 1-11.

*Equity — Averments necessary — Demurrer.*

See pl. 12-15.

1. — *Law — Averments necessary — Demurrer — Judgment.*] A declaration need not allege facts that take the case out of the statute. *Mandeville v. Wilson*, 5 Cranch, 15.

2. A plea of the statute must state the facts if the complaint does not state them. If it asserts merely a conclusion of law, it is bad. *Alexander v. Bryan*, 110 U. S. 414.

3. In an action for money payable on demand, a plea that the action did not accrue within the statute period is good; and if no demand were made until within that period, the replication should not confess the plea. *United States v. Buford*, 3 Pet. 12.

4. A replication of an account between merchants to a plea of the statute of limitations need not allege that the account has not been stated,

**LIMITATION — PLEADING AND PRACTICE — continued.**

to bring the case within the statute exception. *Toland v. Sprague*, 12 Pet. 300.

5. Where the statute period as to contracts of one kind is three years, and as to those of another, two, a plea of *non accrevit* within the latter period will not be good where the declaration is so framed as to admit proof of a contract of either kind. *Lyon v. Bertram*, 20 How. 149.

6. An averment that an appeal relied on to suspend the running of a statute of limitations was duly taken is, in effect, but an averment that the statute was suspended for a time. *Braun v. Sauerwein*, 10 Wal. 218.

7. Unless the contrary rule is established by statute, the defence of the statute of limitations, to avail, must be pleaded or raised on the trial or before judgment; and such is the rule in New York. *Retzer v. Wood*, 109 U. S. 185.

8. The English rule that at law the defence of the statute of limitations cannot be made under a demurrer does not prevail in Wisconsin, and, therefore, not in the federal courts in Wisconsin, the rule there, under the code, permitting the objection to be so made where, on the face of the complaint, the statute period appears to have elapsed, and there is nothing to rebut its effect. *Chemung Canal Bank v. Lowery*, 93 U. S. 72.

9. To avoid a plea of the statute of limitations to an action by joint tenants, it must be shown that all the plaintiffs were under disability to sue. *Marsteller v. M'Clean*, 7 Cranch, 156.

10. The proper judgment for the defendant on a plea of the statute is, that the plaintiff take nothing by his writ. *United States Bank v. Donnelly*, 8 Pet. 361.

11. A foreign attachment in chancery is, as against the debtor, an action at law, and he may plead the statute without the support of an answer. *Wilson v. Koontz*, 7 Cranch, 202.

12. — *Equity — Averments necessary — Demurrer.*] If the plaintiff rely upon non-residence or absence as exempting him from the operation of the statute, he should allege it in the bill, or after plea or answer in an amendment thereof. *Piatt v. Vattier*, 9 Pet. 405.

13. If it appear on the face of a bill that the case stated is barred by the statute, and that the excuse of concealment by the defendant of the cause of action is not so alleged as to avail the plaintiff, the defect can be taken advantage of by demurrer. *Mercantile National Bank v. Carpenter*, 101 U. S. 567.

14. An averment of fraud and concealment, to avoid the effect of the statute upon a bill to enforce an implied trust, must set out the particular acts of fraud and concealment, and state distinctly the time of discovery. *Beaubien v. Beaubien*, 23 How. 190.

**LIMITATION — PLEADING AND PRACTICE —**  
*continued.*

15. Where a bill states a trust and a failure either to account or to give information, although demanded, a demurrer on the ground of the statute cannot be sustained. It does not clearly appear from the bill that the statute has run. *Bacon v. Rives*, 106 U. S. 99.

**LIMITATION — STATUTES —** *Validity under the Constitution and the Acts of Congress.*

See pl. 1-6.

*Construction — In general — To what the Statutes apply.*

See pl. 7-15.

*When, in Particular Cases, Statutes begin to run.*

See pl. 16-30.

*Construction of Statutes of Particular States.*

See pl. 31-61.

*Construction as affecting Criminal Proceedings.*

See pl. 62-68.

1. — *Validity under the Constitution and the Acts of Congress.* Statutes of limitation, unless retroactive in their effect, do not impair the obligation of contracts. *Sturges v. Crowninshield*, 4 Wheat. 122; *Bacon v. Howard*, 20 How. 22.

2. A provision in a statute of limitations to the effect that, when one party is out of the state, the statute shall not run against the other if he resides in the state, but shall if he resides out of it, is not repugnant to that provision of the constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." [STRONG, J., dissenting.] *Chemung Canal Bank v. Lavery*, 93 U. S. 72.

3. The legislature has the constitutional power to provide that existing causes of action shall be barred unless suits be brought to enforce them within a period shorter than that prescribed when they arose, if a reasonable time be given before the bar takes effect. *Koshkonong v. Burton*, 104 U. S. 668.

4. An enactment reducing the time for bringing actions on existing claims of a certain class does not impair the obligation of a contract if a reasonable time is given; as, for instance, nine months, when the circumstances seem to justify the legislative action, and the time appears sufficient to enable creditors to elect whether to enforce their claims or abandon them. *Terry v. Anderson*, 95 U. S. 628.

5. A statute giving a right of action on a debt barred by the statute of limitations, but with a limitation of sixty days, is valid as to the limitation even as against a creditor who lives so far away as to be unable to avail himself of the right to sue within the statute period. *Bacon v. Howard*, 20 How. 22.

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**LIMITATION — STATUTES —** *continued.*

6. The power of the several states to enact statutes of limitation barring actions on judgments recovered either within or without the state is not affected by the act of May 26, 1790 (1 Sts. 122), providing for the authentication of records, etc., which makes a judgment regularly recovered in another state and duly authenticated conclusive evidence of an established demand as of the date of such judgment. *Alabama State Bank v. Dalton*, 9 How. 522; *Bacon v. Howard*, 20 How. 22.

7. — *Construction — In general — To what the Statutes apply.* The statute of limitations should be considered as emphatically a statute of repose. *Bell v. Morrison*, 1 Pet. 351. And see *M'Cluny v. Silliman*, 3 Pet. 270.

8. The statute in force when the suit is brought is the one which determines the right to sue. *Patterson v. Gaines*, 6 How. 550.

9. A statute limiting the time within which the owner of land sold for taxes must bring suit for its recovery, and declaring that it shall not apply where the land was not liable to taxation, bars a suit brought after the time limited where the irregularity consisted of an illegal item included in the amount for which the sale was made. *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379.

10. Where an action is brought for breach of a bond conditioned that the obligor shall carry out the stipulations of a written contract, if the matter on which the breach is predicated is fairly within the contract, it cannot be contended that the action is barred by a statute of limitations which would bar an action not founded on an instrument in writing. *Streeper v. Victor Sewing-Machine Co.*, 112 U. S. 676.

11. An action on ordinary coupons, which, as respects the interest, are but copies of the bond, and are of the same high character, is barred only on the lapse of such a period after their maturity as would bar an action on the bond itself after its maturity. *Kenosha v. Lamson*, 9 Wal. 477; *Lexington v. Butler*, 14 Wal. 282; *Clark v. Iowa City*, 20 Wal. 583 [CLIFFORD, J., dissenting].

12. And it makes no difference whether they are still attached to the bonds, or have been detached and the bonds paid. *Amy v. Dubuque*, 98 U. S. 470; *Koshkonong v. Burton*, 104 U. S. 668.

13. A state statute barring "all actions on the case" applies to an action on the case against a federal officer for non-feasance in office. *M'Cluny v. Silliman*, 3 Pet. 270.

14. If relief against an agent would be barred by the statute, relief against his principal will be barred as well, there being no special equities affecting the case. *Ware v. Galveston City Co.*, 111 U. S. 170.

15. A ratification by the legal representative of a deceased person of a sale of property belonging to the estate by an agent of executors in

**LIMITATION — STATUTES — continued.**

their own wrong, places such representative in the position of the executors with respect to a judgment recovered against the agent for the proceeds, so that if an action thereon by the executors would be barred by lapse of time, an action thereon by the representative would also be barred. *Gaines v. Miller*, 111 U. S. 395.

16. — *When, in Particular Cases, Statutes begin to run.* In the absence of contrary provision, a statute of limitation, so far as it affects rights in existence on its enactment, is to be deemed to begin to run when the cause of action is first subjected to its operation. *Sohn v. Waterson*, 17 Wal. 596.

17. The repeal of a saving clause in a statute of limitations sets the statute in motion to that extent as from the time of the repeal only. [McLEAN, J., dissenting.] *Lewis v. Lewis*, 7 How. 776. See *Ross v. Duval*, 13 Pet. 45.

18. The Tennessee statute did not begin to run as to lands in dispute on the Virginia border until the dominion of Tennessee over them was settled by compact between the two states. *Robinson v. Campbell*, 3 Wheat. 212.

19. In Illinois, under the statute of 1839, the period of limitation begins to run in favor of one in possession in good faith under claim and color of title, with the beginning of possession. *Beaver v. Taylor*, 1 Wal. 637.

20. But where the land is "vacant and unoccupied" it begins to run in favor of one having "color of title, made in good faith," from his first payment of taxes after acquirement of such color of title. *Ib.*

21. The statute begins to run against the landlord on dissolution of that relation. *Wilson v. Watkins*, 3 Pet. 43.

22. The cause of action against an attorney for negligence or want of skill accrues to the client on the date of such negligence, and the statute then begins to run, although the actual damage be not sustained until afterwards. *Wilcox v. Plummer*, 4 Pet. 172.

23. The statute runs against a purchaser's right of action under a covenant of general warranty from the time of eviction. *Flowers v. Foreman*, 23 How. 132.

24. The statute begins to run in favor of a purchaser of the interest of a bankrupt mortgagor from an assignee in bankruptcy under the act of 1841, from the time the mortgagor was declared bankrupt, and not from the time of the delivery of the deed. *Cleveland Insurance Co. v. Reed*, 24 How. 284.

25. Prescription of a mortgage does not begin to run until the mortgage debt has matured. *Patterson v. De la Ronde*, 8 Wal. 292.

26. Where the charter of a bank contains a provision binding the property of stockholders for the ultimate redemption of its bills, in proportion to the number of their shares, the liability attaches when the bank refuses or ceases to redeem, and is notoriously and continuously insolvent,

**LIMITATION — STATUTES — continued.**

and the statute then begins to run in their favor. *Terry v. Tubman*, 92 U. S. 156; *Terry v. Anderson*, 95 U. S. 628.

27. The statute begins to run at the same time in favor of stockholders whose subscriptions were not paid in full at the time of the failure, where a call and notice are not made a condition precedent to the right to enforce their liability by action. *Terry v. Anderson*, 95 U. S. 628.

28. Where one sells and conveys land to a county, and the county illegally agrees to pay at a future definite time, the vendor may wait a reasonable time to see if payment will not be made irrespective of the agreement, before exercising his election to rescind the contract and claim a reconveyance; and, therefore, the statute only begins to run after the expiration of such reasonable time. *Chapman v. Douglas County*, 107 U. S. 348.

29. Where a statute, as does that of Maine, gives to a judgment creditor of a corporation the right in certain circumstances to file his bill in equity to reach the property of the corporation, the right accrues only after the return of an unsatisfied execution, and the statute of limitations, therefore, does not begin to run from the time of the recovery of the judgment. *Taylor v. Bowker*, 111 U. S. 110.

30. An order of a probate court on an executor's accounting, that confederate bonds be paid to the distributee as and for his share of the estate, being a nullity, does not fix the time for the running of the statute of limitations in an action against the executor. The direction for payment is inseparable from the direction to pay in bonds. *Alexander v. Bryan*, 110 U. S. 414.

31. — *Construction of Statutes of Particular States.* Under the law of Arkansas, five years' possession under an invalid deed from a tax collector is a bar. *Pillow v. Roberts*, 13 How. 472.

32. In the California statute of limitations, which provides that the state will not sue for real property unless the "right or title shall have accrued within ten years before any action," etc., the words "shall have accrued" are used in the sense of "shall have existed." *Weber v. Harbor Commissioners*, 18 Wal. 57.

33. The California statute which provides that no action for the recovery of real estate sold by order of a probate court "shall be maintained by any heir or other person claiming under the intestate," unless brought within three years of the sale, applies to an administrator who made the sale as well as to the heirs, and bars them equally. *Meeks v. Olpherts*, 100 U. S. 564.

34. In Illinois, under the statute which provides that residence for seven years by one "having a connected title in law or equity deducible of record from the state or the United States" shall be a bar, it is not necessary that the entire title, but only that its source or foundation, be

**LIMITATION — STATUTES — continued.**

matter of record. *Dolton v. Cain*, 14 Wal. 472.

35. Where one purchases from an attorney in fact, pays part of the purchase-money, receives a bond for a deed, and offers to pay the residue when it is due, but the attorney declines to receive it because he has heard a rumor that his principal, who resides abroad, is dead, he has a title which equity would recognize and convert into a legal title, and which, therefore, is a title in equity within the meaning of that statute. *Ib.*

36. His title is not less an equitable one because the only title in the principal was that of a *cestui que trust* under an ancient deed; nor because the bond is in the name of the principal alone, although the wife was joined in the power, the wife not having been named in the deed of trust; nor because there is an error in the bond in the baptismal name of the principal, the error being accidental. *Ib.*

37. The Illinois statute of 1835, limiting actions for the recovery of land to seven years, does not bar an ejectment brought within seven years of a sale to the plaintiff under a judgment against the owner, although the defendant has had possession for more than seven years under a deed made by the judgment debtor after the lien of the judgment attached, as the statute does not begin to run in such case as against the creditor until the lands have been sold on execution, and he has thereby acquired a right of entry or of action against the one in possession. [CLIFFORD, J., dissenting.] *Pratt v. Pratt*, 96 U. S. 704.

38. The Illinois statute of February 21, 1861, to protect married women in their separate property, repealed by implication the saving clause of the statute of limitations of 1839, relating to married women; and hence, against the right of a woman then married, in lands of which she was already seised, the limitation began to run when it had run against the right of the husband. *Kibbe v. Ditto*, 93 U. S. 674.

39. In Kentucky, claimants under military warrants, without entry, are barred by the limitation of seven years; for such titles, being inchoate, are not within the statute exception of complete legislative grants. *Porterfield v. Clark*, 2 How. 76.

40. Article 3499 of the Louisiana code, which limits "actions for the payment of the freight of ships," does not apply where the plaintiff is a ship-broker, and the contract is not one of affreightment. *New Orleans, etc. Railroad Co. v. Lindsay*, 4 Wal. 650.

41. In Louisiana, the statute limitation of three years does not govern a claim against a *mala fide* possessor for mesne profits. Profits are allowed, as by the rule in equity, from the time the complainant's title accrued. *New Orleans v. Gaines*, 15 Wal. 624.

42. The Maryland statute of limitations is a bar to an action for money had and received, al-

**LIMITATION — STATUTES — continued.**

though brought to try the title to land in the city of Washington under the Maryland statute of November, 1791. *Beatty v. Burnes*, 8 Crauch, 98.

43. Under the Nebraska code, the statute of limitations runs on rights of action against a foreign corporation while the corporation has a managing agent in the state. *United States Express Co. v. Ware*, 20 Wal. 543.

44. Foreign corporations are not within the protection of the Nevada statutes of limitation. *Union Consolidated Silver Mining Co. v. Taylor*, 100 U. S. 37.

45. Under the New Jersey statute of 1787, possession for the statute period of thirty years, under a *bona fide* purchase from one in possession by way of a vested remainder, will bar an entail and give an absolute title. *Croxall v. Shererd*, 5 Wal. 268.

46. In New York, a religious corporation may make defence to a bill setting up an adverse title to land of which it is in possession, under the statute of limitations, whether by law capable of taking and holding the land or not. *Harpending v. Reformed Protestant Dutch Church*, 16 Pet. 455.

47. The courts of New York have decided, construing the statutes of limitation of that state, that a foreign corporation cannot avail itself of them, although the lessee of a railroad in the state, and having property, a resident managing agent, and an office, there. [MILLER and STRONG, JJ., dissenting.] *Tioga Railroad Co. v. Blossburg & Corning Railroad Co.*, 20 Wal. 137.

48. In South Carolina, a suit in equity brought by creditors of a corporation, to enforce against stockholders a liability beyond the value of their stock, is barred by the statute of 1712, which requires actions on the case and actions of debt grounded on any "contract without specialty" to be brought within four years, a proper remedy at law being an action on the case, and the defence being good in equity. *Carrol v. Green*, 92 U. S. 509; *Godfrey v. Terry*, 97 U. S. 171; *Terry v. McLure*, 103 U. S. 442.

49. In Tennessee, an action of debt on a promissory note, held not within the bar of the statute. *Kirkman v. Hamilton*, 6 Pet. 20.

50. The Texas statute of limitation of actions on contracts or for the detention of personal property, has no application to a bill in equity. *Union Bank v. Stafford*, 12 How. 327; *New Orleans Canal & Banking Co. v. Stafford*, Id. 343.

51. In Texas, if a suit on a debt be not barred by the statute, a suit to foreclose the mortgage by which it is secured is not, the mortgage being a mere incident to the debt. *Ewell v. Daggs*, 108 U. S. 143.

52. A debt barred under the laws of the republic of Texas was not revived by the admission of Texas into the Union. *Bacon v. Howard*, 20 How. 22.

53. Construction of the Vermont statutes.



**LIMITATION — STATUTES — continued.**

*Society for Propagation of the Gospel v. Pawlet*, 4 Pet. 480.

54. The Virginia statute, in the circumstances, held not a bar. *Hopkirk v. Bell*, 4 Cranch, 164.

55. Five years' adverse possession of a slave in Virginia, held to give a good title on which trespass might be maintained. *Brent v. Chapman*, 5 Cranch, 358.

56. Or detainee, the possession being *bona fide*. *Shelby v. Guy*, 11 Wheat. 361.

57. If the owner of a slave permit her to remain in the possession of A. for four years, and A. then, without the assent of the owner, deliver her to B., who keeps her four years more, the possession of B. cannot be so connected with that of A. as to make out a loan fraudulent as to B.'s creditors, within the Virginia statute of frauds. *Auld v. Norwood*, 5 Cranch, 361.

58. In Virginia, the oath prescribed by statute to be taken by one who brings slaves into the state, to save them from emancipation, may be presumed after the lapse of twenty years accompanied by possession. *Mason v. Matilda*, 12 Wheat. 590.

59. In Wisconsin, under the statute of 1839, possession for ten years under a claim of title in fee is a bar to a bill of foreclosure. *Cleveland Insurance Co. v. Reed*, 24 How. 284.

60. The North Carolina statute of 1715, limiting the time within which the creditors of a decedent must present their claims, is not a bar to a bill against his heirs to obtain the legal title to land which he had contracted to convey, the plaintiff in such case not being a creditor, within the meaning of that statute. *Coulson v. Walton*, 9 Pet. 62.

61. The Georgia statute of March 16, 1869, requiring actions to be brought before January 1, 1870, must be construed, as it has been by the supreme court of the state, to permit suits against administrators to be brought within the time allowed by prior statutes; i. e., nine months and fifteen days after administration granted. To hold otherwise would be to impair the operation of other laws, presumed not repealed. *Mills v. Scott*, 99 U. S. 25.

62. — *Construction as affecting Criminal Proceedings.* A *qui tam* action, founded on the act of March 22, 1794 (1 Sts. 347), prohibiting the slave trade, is barred by the lapse of more than two years, under § 32, act of April 30, 1790 (1 Sts. 119), limiting prosecutions under penal statutes. *Adams v. Woods*, 2 Cranch, 336.

63. An indictment under section 16 of the act of August 6, 1846 (9 Sts. 63), which denounces as a felony the embezzlement of public money by an army paymaster, may be good on special demurrer although it allege an offence as committed more than two years before the filing of the indictment; and section 32 of the crimes act prescribes a two years' limitation in such case, but provides that nothing contained therein shall

**LIMITATION — STATUTES — continued.**

extend to any person fleeing from justice. To sustain the demurrer would deprive the prosecution of the right to show, as otherwise it might, such being the fact, that the respondent fled from justice, or that the offence was committed within the statute period, time not being of the essence of the offence. *United States v. Cook*, 17 Wal. 168.

64. The two years' limitation prescribed by section 32 of the act of 1790 is the only one applicable to an offence under section 16 of the act of 1846. *Ib.*

65. The act of May 17, 1864 (13 Sts. 76), establishing a postal money-order system, is not a revenue law within the meaning of the act of March 26, 1804, § 3 (2 Sts. 290), which prescribes five years as the limitation of prosecutions for offences against those laws. An indictment for the embezzlement of money belonging to the postal money-order office must therefore be found within two years, under section 32 of the act of 1790. *United States v. Norton*, 91 U. S. 566.

66. The withholding of a pension is not a continuing offence so that the bar of the statute of limitations may not be pleaded to an indictment preferred after the time prescribed. The statute begins to run from the time of the act which constitutes the withholding, as, for instance, from the time of demand and refusal. *United States v. Irvine*, 98 U. S. 450.

67. A conspiracy to defraud the United States of duties is not "a crime arising under the revenue laws;" an entry of goods by means of a fraudulent invoice and false classification as to quality and value is. In the first case, therefore, a prosecution is barred in three years; in the last case, in five. *United States v. Hirsch*, 100 U. S. 33.

68. The Louisiana code prescribes in one year actions based on offences or *quasi* offences. An action against a bank to recover damages caused by its refusal to transfer stock is not within this category. *Case v. Citizens' Bank*, 100 U. S. 446.

*Act of 1803 for Relief of Insolvent Debtors.*  
See *INSOLVENCY*, 31, 32.

*Agent to collect Debts not Factor within the Meaning of Law of Virginia.*  
See *FACTOR*, 1.

*Constitutionality — When not unconstitutional.*  
See *CONTRACT — IMPAIRMENT OF OBLIGATION*, 54.

*Running of Statute — Appeals — When Time begins to run — Disability — Interruption by Rebellion.*

See *APPEAL — TAKING AND PERFECTING*, 15 *et seq.*

*Running of Statute — When it begins to run on Right of Action for Duties paid under Protest, etc. — When pleadable.*

See *DUTIES — REMEDIES FOR ILLEGAL EXACTION*, 12, 13.

**LIMITATION — STATUTES — continued.**

*Running of Statute — Writ of Error — In general — Time begins to run in Case of Petition for Rehearing, when the Petition is disposed of.*

See **ERROR — BRINGING AND PERFECTING**, 17, 21.

*State — Statutes do not run against.*

See **STATES — LIMITATION**.

*United States — Statutes do not run against.*

See **UNITED STATES — LIMITATION**.

*What constitutes Statute.*

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*What constitutes Statute.*

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**LIQUIDATED DAMAGES — In general — What constitutes, etc.**

See **DAMAGES**, 44 et seq.

**LIQUIDATED DEMANDS — Matter of Debt, Set-off, etc.**

See **DEBT; SET-OFF**.

**LIQUOR — Intoxicating — In general.**

See **INTOXICATING LIQUOR**.

**LIS PENDENS — Notice — What constitutes — Notice to whom.**

See pl. 1-7.

*Bar — What constitutes — Scope and Effect.*

See pl. 8-18.

1. — *Notice — What constitutes — Notice to whom.*] A suit not prosecuted to judgment is notice to a purchaser *pendente lite* only. *Alexander v. Pendleton*, 8 Cranch, 462.

2. A suit is not so pending as to operate as constructive notice, until process has been served or publication made. *Games v. Dunn*, 14 Pet. 322.

3. A purchaser *pendente lite* is bound by the judgment or decree against his vendor. *Walden v. Bodley*, 9 How. 34.

4. A creditor's bill, to operate as notice of a *lis pendens* as to real estate, must be so definite in the description that one may thereby learn what property is the subject of the litigation. *Miller v. Sherry*, 2 Wal. 237.

5. The doctrine of *lis pendens* has no application, where there were three distinct and independent suits, with an interval of one year between the first and second, and of two years between the second and third. *Lee County v. Rogers*, 7 Wal. 181.

6. What is embraced in a *lis pendens*. *Watson v. Jones*, 13 Wal. 679.

7. A purchaser *pendente lite* is as conclusively bound to the result of the litigation as if he had been a party from the outset. *Tilton v. Coffield*, 93 U. S. 163.

**LIS PENDENS — continued.**

8. — *Bar — What constitutes — Scope and Effect.*] Plea of another suit brought for the same cause of action in the court of another state since the last continuance is bad. *Renner v. Marshall*, 1 Wheat. 215.

9. A foreign attachment out of a state court, issued after the beginning of an action in a federal court for recovery of the debt attached, held not pleadable in defence to the action. *Wallace v. M'Connell*, 13 Pet. 136.

10. A question pending in a court of competent jurisdiction cannot be raised and agitated in another court by adding a new party and raising a new question as to him, along with the old one as to the former party. *Memphis v. Dean*, 8 Wal. 64.

11. The pendency of an earlier suit is not a bar where the identity of the parties, of the case made, and of the relief sought are not such that if the case were decided the decision would not avail in bar as a former adjudication. *Watson v. Jones*, 13 Wal. 679.

12. On a bill, therefore, showing rights in the complainants as *cestuis que trust*, and praying for an injunction to restrain the defendants from taking possession under an unexecuted order in an earlier pending cause, and for general relief, although the court will not enjoin, it may inquire into the character of the possession to be delivered, and if it be of a fiduciary character, and if the question be not involved in the earlier suit, it may proceed to declare, define, and protect the trust. *Ib.*

13. It is no ground of abatement of an action at law that a suit in equity is pending in which the plaintiff asks for a decree for the same money, as the result of the action may be necessary for the perfecting of the decree. *Kittredge v. Race*, 92 U. S. 116.

14. The pendency of a prior suit in a state court is not a bar to a suit in a federal circuit court, or in the supreme court of the District of Columbia, by the same plaintiff against the same defendant for the same cause of action. *Stanton v. Embrey*, 93 U. S. 548.

15. The pendency of a proceeding for seizure and sale in a Louisiana state court cannot affect the right to sue for the debt in the federal court. *Gordon v. Gilfoil*, 99 U. S. 168.

16. Although, by the letter of the Louisiana code, the exception of *lis pendens* may be taken only where the former suit is pending before another court, the spirit of the law permits the exception although both suits are pending in the same court. *Fleitas v. Cockrem*, 101 U. S. 301.

17. In such a case, the plaintiff may be required to elect whether to submit to judgment on the exception, or to discontinue the first suit and pay the costs thereof. *Ib.*

18. *Semble* that where a suit in equity for an infringement has been brought in the name of the patentee, with the consent and concurrence of the licensee under a license giving him exclusive

**LIS PENDENS** — *continued.*

rights, and a decree for the plaintiff has been rendered which, if deemed for too small a sum, might have been appealed from, another suit against the same defendant for the same infringement cannot be brought merely because the licensee was not a formal plaintiff in the first suit. *Birdsell v. Shaliol*, 112 U. S. 485.

*Effect of, on Municipal Bonds.*

See MUNICIPAL BONDS — IN GENERAL, 44-50.

*Plea of another Suit pending.*

See PLEADING — GENERAL RULES, 13.

*Purchaser pendente Lite.*

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*Suit pending in another Jurisdiction — Injunction.*

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**LITTORAL PROPRIETOR** — *In general.*

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**LOCATION** — *Lands — In general.*

See LANDS.

*Meaning of the Word.*

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*Mining Claims — How located.*

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**LOSS** — *Goods by Carrier.*

See CARRIER.

*Original Evidence — Loss of, how shown to admit secondary.*

See EVIDENCE — PRIMARY AND SECONDARY, 25, 26.

*Insurance — What constitutes Loss — Total — Partial.*

See INSURANCE.

**LOST INSTRUMENT** — *Proof — Suit in Equity thereon.*] A special count on a lost instrument is not necessary to the admission of secondary evidence of its contents. *Renner v. Columbia Bank*, 9 Wheat. 581.

2. If the equity of a bill depend on the loss of a deed, an affidavit of loss should be annexed to the bill; but the omission thereof, although cause for demurrer, is waived by the filing of an answer. *Findlay v. Hinde*, 1 Pet. 241.

3. Equity has no jurisdiction of a suit on a lost draft, where it does not appear that the plaintiff has searched for the draft in the place where it would be most likely to be found; as, for instance, the draft having been left with a referee, and no search having been made of the files of the court to which the referee made his report, nor appli-

**LOST INSTRUMENT** — *continued.*

cation made to the court, but inquiry having been made of the referee and of other persons. *Rogers v. Durant*, 106 U. S. 644.

*Secondary Evidence of Contents of Lost Will.*

See WILL, 16.

*Specific Performance — Lost unacknowledged Deed.*

See SPECIFIC PERFORMANCE, 27.

**LOTTERY** — *Under Charter of City of Washington — Drawing, what valid.*] The charter of the city of Washington did not empower the corporation to force the sale of tickets in lotteries thereby authorized, in states whose laws prohibited such sales. *Cohens v. Virginia*, 6 Wheat. 264.

2. Under its charter the corporation was liable to the holder of a ticket for the amount of a prize drawn thereon in a lottery drawn for the improvement of the city, notwithstanding a sale of the lottery to a dealer for a gross sum, by managers appointed by the corporation, the exercise of the power conferred by the charter being on account of the corporation, and at its risk. *Clark v. Washington*, 12 Wheat. 40.

3. The city sold all the profits in the lottery and delivered the tickets to the purchaser for sale. After the drawing the purchaser presented a ticket which had drawn a prize, and an undivided half of which he had sold without notice to the city, and received its value. It was held that the contract of the city could not be so divided, no half ticket having been issued by the city or by its authority, and that the city was therefore not liable to the purchaser of such half ticket. *Shankland v. Washington*, 5 Pet. 390.

4. An irregularity in the drawing of a lottery which did not alter one's chances does not constitute an invalidity of which he can complain. *Brent v. Davis*, 10 Wheat. 395.

*Power of State to regulate, notwithstanding Corporate Charters.*

See CORPORATION — CHARTER, 23.

**LOUISIANA** — *Cession to United States — Admission to the Union — Right to Religious Liberty.*] The treaty of April 30, 1803 (8 Sts. 200), for the cession of Louisiana, took effect as of its date. *United States v. Reynes*, 9 How. 127; *Davis v. Concordia Parish*, Id. 280.

2. The stipulation in that treaty for the protection of the inhabitants in their property, etc., ceased to operate when Louisiana was admitted into the Union. *New Orleans v. De Armas*, 9 Pet. 223.

3. Although the act of March 2, 1805 (2 Sts. 322), granted to the inhabitants of the territory of Orleans the rights secured to the people of the Northwestern territory by the ordinance of 1787, so far as they had been conferred on the people of the Mississippi territory, yet the political right

**LOUISIANA — continued.**

to religious liberty provided for in that ordinance and in that act ceased to depend thereon when the state was admitted to the Union, and existed, if at all, only under the constitution of the state. *Permoli v. New Orleans*, 3 How. 539.

4. Congress must be deemed to have been satisfied, when, by the act of April 8, 1812 (2 Sts. 701), it admitted Louisiana into the Union "on an equal footing with the original states," that the restrictions imposed by the act of February 20, 1811 (2 Sts. 641), on the convention which was to frame the state constitution, had

**LOUISIANA — continued.**

been observed; so that it can no longer be a question under any federal law whether an individual has been injured by a violation of a right, as a right to religious liberty, intended to be secured by those restrictions. *Ib.*

*Debt — Funding.*

See **CONTRACT — IMPAIRMENT OF OBLIGATION**, 24-26.

*French and Spanish Titles to Lands.*

See **LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS.**

## M.

**MAGISTRATE** — *Incompetency to sit, as affecting Discharge from Imprisonment.*

See **INSOLVENCY**, 30.

*Powers, etc. — In general.*

See **COURT** — **IN GENERAL**; **JUSTICE OF THE PEACE**.

**MAILABLE MATTER** — *What is — Carriage out of the Mail.*

See **POST-OFFICE**, 20.

**MAINTENANCE** — *Effect — Purchase from one out of Possession.*] The English statute of maintenance, although it avoids the contract between the parties, does not authorize the dismissal of a suit between other parties, although the suit be in furtherance of the object of the contract. *Boone v. Chiles*, 10 Pet. 177.

2. In Michigan, the common law of maintenance as to a purchase of land of which the vendor is out of possession, is not in force. *Roberts v. Cooper*, 20 How. 467.

**MALICE** — *Element of Right of Action.*

See **LIBEL AND SLANDER**; **MALICIOUS PROSECUTION**.

*Element of Crime — In general.*

See **CRIME**.

**MALICIOUS PROSECUTION** — *What constitutes — Malice and Probable Cause — Damages.*

The rule that in an action for the malicious institution of civil proceedings, proof of probable cause, concurrence of malice and the want of probable cause being essential to the maintenance of such an action, is a defence, applies where the defendant has instituted proceedings in bankruptcy against the plaintiff pending a suit to recover a debt incurred by a firm of which the defendant alleges the plaintiff to have been a member, and, the suit having been decided in the plaintiff's favor, the proceedings in bankruptcy have fallen to the ground. [BRADLEY, J., dissenting, on the ground that nothing short of the actual existence of the relation of debtor and creditor can justify the institution of proceedings in bankruptcy.] *Stewart v. Sonneborn*, 98 U. S. 187.

2. And in such case, as in general, action taken in good faith on the advice of reputable counsel, given on a full statement of the facts, must be deemed to have been taken on probable cause. [BRADLEY, J., dissenting.] *Ib.*

3. Probable cause consists in such facts and circumstances as would excite belief in a reasonable mind that the person charged was guilty of

**MALICIOUS PROSECUTION** — *continued.*

the crime for which he was prosecuted. *Wheeler v. Nesbitt*, 24 How. 544.

4. Want of probable cause gives rise to a rebuttable presumption of malice. *Ib.*

5. To maintain an action for malicious prosecution, the plaintiff must prove both malice and the want of probable cause. Thus, an instruction to the jury that, to excuse the defendant, it must appear that he had probable cause, or that he acted *bona fide* without malice, is not error as against the plaintiff. *Ib.*

6. Whether the inference of malice is a reasonable one, on the facts proved, is a question for the jury. *Ib.*

7. Thus, an instruction that, if the arrest was wanton and reckless, and no circumstances existed to induce a reasonable and dispassionate man to believe in the guilt of the accused, the jury ought to infer malice, is not error as against the plaintiff, being favorable to him rather than otherwise. *Ib.*

8. The fees of counsel prosecuting the action are not an element of damages in an action for malicious prosecution. *Stewart v. Sonneborn*, 98 U. S. 187.

**MANDAMUS** — *In general — On what the Remedy depends — What Courts may apply it — State Courts — Federal Courts.*

See pl. 1-13.

*When issued to compel Public Officers to perform their Duties — To compel Performance of Ministerial Acts, but not to control Judgment or Discretion.*

See pl. 14-27.

*When issued to compel Municipal Corporations to pay Debts, etc.*

See pl. 28-38.

*When issued to Inferior Courts — To compel Action, but not to control Judgment or Discretion, concerning Pleading, Intervention, Trial, Judgment, Execution, Appeal, Error, Exceptions, etc. — To control Disbarment of Attorneys — In Lieu of Appeal or Writ of Error.*

See pl. 39-77.

*Practice — To whom Writ should be directed — Parties — Service and Return — Hearing — Setting aside Writ — Abatement — Amendment — Necessity for Preliminary Judgment.*

See pl. 78-100.

1. — *In general — On what the Remedy depends — What Courts may apply it — State Courts — Federal Courts.*] In modern practice

**MANDAMUS** — *continued.*

the issue of a writ of mandamus does not depend on prerogative power, but is regarded as ordinary process in cases to which it is applicable. *Kentucky v. Dennison*, 24 How. 66.

2. A state court cannot issue the writ to a federal officer. *McClung v. Silliman*, 6 Wheat. 598.

3. The power of the circuit courts to issue it is confined to cases in which it is necessary for the exercise of their jurisdiction. *McIntire v. Wood*, 7 Cranch, 504; *Bath County v. Amy*, 13 Wal. 244. See *Kendall v. United States*, 12 Pet. 524.

4. They cannot use the writ as an original and independent remedy, but only to enforce rights where jurisdiction has already been acquired. *Heine v. Levee Commissioners*, 19 Wal. 655.

5. They may issue it when necessary to the exercise of their jurisdiction and according to the common law. *Knox County Commissioners v. Aspinwall*, 24 How. 376.

6. The circuit courts, having power to issue writs of mandamus only where they are ancillary or necessary to jurisdiction already acquired, cannot issue such a writ to compel a municipal corporation to levy a tax to pay bonds not yet put in suit. *Bath County v. Amy*, 13 Wal. 244.

7. Nor is it otherwise under the act of May 19, 1828 (4 Sts. 278), conforming proceedings at law in the federal courts to proceedings in the state courts, in a state where a mandamus is a civil action such as might fall within the original jurisdiction of a circuit court under section 11 of the judiciary act, the act of 1828 having no effect to enlarge jurisdiction, but merely to regulate procedure. *Ib.*

8. The district courts having no power to issue the writ, except where it is ancillary to jurisdiction already acquired, cannot issue it at suit of an assignee in bankruptcy to compel a state auditor to deliver certificates for the amount of taxes paid by the bankrupt, pursuant to a statute declaring the taxes illegal, and directing the auditor to issue such certificates, the proceeding being original. *Graham v. Norton*, 15 Wal. 427.

9. Section 13 of the judiciary act of 1789 is inoperative as a grant to the supreme court of power to issue writs of mandamus, otherwise than for the purpose of exercising appellate jurisdiction, in cases of which it has not original jurisdiction under the constitution. *Marbury v. Madison*, 1 Cranch, 137.

10. The issue by that court of a writ of mandamus requiring the secretary of state to deliver commissions to justices of the peace in the District of Columbia is an exercise of original jurisdiction, not conferred by the constitution nor conferable by congress on that court. *Ib.*

11. Mandamus lies from that court to an inferior court — to the supreme court of the District of Columbia, for instance — to restore an attorney

**MANDAMUS** — *continued.*

who has been disbarred for a matter of which that court had no jurisdiction, *e. g.* a contempt committed before another court. [MILLER, J., dissenting.] *Ex parte Bradley*, 7 Wal. 364.

12. So it lies to a circuit court to enforce the return to the state authorities of a colored man convicted of crime by a state court but taken into custody by a marshal, under a writ of *habeas corpus cum causa*, for a supposed denial of the equal protection of the laws on the trial, it appearing that there had been no such denial as to justify the intervention of a federal court. *Virginia v. Rives*, 100 U. S. 313.

13. A justice of the supreme court, holding its August term under the act of April 29, 1802 (2 Sts. 156), has no power under that act to allow a rule to show cause why the writ should not issue. *Ex parte Hennen*, 13 Pet. 225.

14. — *When issued to compel Public Officers to perform their Duties — To compel Performance of Ministerial Acts, but not to control Judgment or Discretion.*] *Semble* that mandamus will lie to compel performance by a public officer of a ministerial act in the doing of which the relator has an interest. *Marbury v. Madison*, 1 Cranch, 137.

15. The supreme court cannot issue a mandamus to the register of a government land office, commanding him to enter an application for land, although the highest state court may have refused to issue the writ on submission by the register to its jurisdiction. *McClung v. Silliman*, 2 Wheat. 369.

16. Nor will mandamus lie to compel either the commissioner of the general land office or the secretary of the interior to issue a patent for land, the statutes requiring such patents to be signed by the president. *Browning v. McGarran*, 9 Wal. 298.

17. Nor to compel the commissioner of the general land office to issue a patent, where there are numerous questions of law and fact depending on circumstances resting in parol proof yet to be obtained, and where the exercise of judicial functions, some of them of high character, is required; nor where it is reasonable to presume that there are persons at the time in possession under another title, who should have an opportunity to defend. *United States v. Commis-sioner*, 5 Wal. 563.

18. The circuit court of the District of Columbia has jurisdiction to issue a mandamus to the postmaster-general, to compel him to do a merely ministerial act which the relator has a complete right to have performed, and as to the performance of which the law gives no discretion. [TANEY, C. J., and BARBOUR and CATRON, JJ., dissenting.] *Kendall v. United States*, 12 Pet. 524.

19. But not to compel the head of an executive department to perform an act not merely ministerial, but involving the exercise of judgment. *Decatur v. Paulding*, 14 Pet. 497.

**MANDAMUS — continued.**

20. Mandamus will not lie to compel the secretary of the navy to pay a naval officer. *Brashear v. Mason*, 6 How. 92.

21. Nor to compel the secretary of the treasury to pay a debt due from the United States, for which no appropriation has been made by law. *Reeside v. Walker*, 11 How. 272.

22. Nor to compel the superintendent of the public printing of the houses of congress to place a document in the hands of the printer of the senate, instead of in the hands of the printer of the house of representatives. *United States v. Seaman*, 17 How. 225.

23. Nor to compel the secretary of the treasury to pay a territorial judge his salary for the remainder of his term, on his removal from office by the president and the appointment of his successor by the president and senate. [McLEAN, J., dissenting.] *United States v. Guthrie*, 17 How. 284.

24. Nor to compel a marshal to levy an execution on property the title to which is in dispute, as the marshal has to act to some extent on his own judgment and at his peril. *New York Life & Fire Insurance Co. v. Adams*, 9 Pet. 573.

25. The writ was refused to compel the secretary of the treasury to deliver a warrant for payment under the act of July 27, 1861 (12 Sts. 276), directing him to refund to any state expenses incurred in raising troops to suppress the rebellion, no request having been made of him until after the expiration of the time limited in the appropriation act. *Kentucky v. Boutwell*, 13 Wal. 526.

26. Where a statute imposes on town auditors the duty of auditing charges against a town, including judgments, they may be compelled by mandamus to audit a judgment properly rendered, their duty in the matter being merely ministerial, and a state statute declaring that the writ shall not be denied because another specific legal remedy may be available. *Lower v. United States*, 91 U. S. 536.

27. Mandamus may issue to compel the commissioner of patents to prepare a patent, to countersign it, and to lay it before the secretary of the interior for his signature, the commissioner having decided that the relator was entitled to it. The remedy by suit in equity, given by Rev. Sts. § 4915, is not appropriate. *Butterworth v. United States*, 112 U. S. 50.

28. — [When issued to compel Municipal Corporations to pay Debts, etc.] A writ of mandamus affords the proper remedy to compel the levy of a tax to pay a judgment against a municipal corporation, and a bill in equity for that purpose will not lie. *Walkley v. Muscatine*, 6 Wal. 481. And see *United States v. Keokuk*, Id. 514.

29. Where a judgment is rendered in a circuit court on the coupons of county bonds for the payment of which the county authorities are legally bound to levy a tax, a mandamus from that

**MANDAMUS — continued.**

court, in case the authorities refuse to make the levy, may properly issue to compel them. *Knox County Commissioners v. Aspinwall*, 24 How. 376; *Von Hoffman v. Quincy*, 4 Wal. 535.

30. After a return unsatisfied of an execution on a judgment of a circuit court against a county for interest on bonds issued in aid of a railroad under a state statute making the levy of a tax to pay such interest obligatory, a mandamus from that court will lie to compel the county officers to levy the tax, although prior to the application therefor the state court have perpetually enjoined them from making such levy, the mandamus being necessary to jurisdiction of the circuit court already attached, and to enforce its judgment, and the state court, therefore, not being in prior possession of the case. [CHASE, C. J., and GRIER and MILLER, JJ., dissenting.] *Riggs v. Johnson County*, 6 Wal. 166; *Weber v. Lee County*, Id. 210; *United States v. Keokuk*, Id. 514; *United States v. Keokuk*, Id. 518; *Amy v. Des Moines County Supervisors*, 11 Wal. 136.

31. An injunction from the state court restraining the levy of a tax to pay the bonds cannot be set up to prevent the issue of the mandamus. *Davenport v. Lord*, 9 Wal. 409; *Washington County Supervisors v. Durant*, Id. 415.

32. Authority to a municipal corporation to contract a debt includes the power and duty to provide means for its payment; and where the validity of the debt is conclusively established by judgment, the corporation may be compelled by mandamus to levy a tax for that purpose. *United States v. New Orleans*, 98 U. S. 381.

33. Where a statute, like the Kansas statute of March 2, 1871, confers on cities of a certain class the amplest authority to incur obligations for all legitimate municipal purposes, and to meet promptly all obligations thus incurred, and such a city issues bonds in the usual form, under an ordinance declaring that they shall be paid from special assessments to be made on the lots abutting on the street for the improvement of which their proceeds were expended, and there is a general reference to this ordinance in the margin of the bonds, mandamus should issue to compel the city to impose a tax on all taxable property within its limits to satisfy a judgment obtained on certain of the bonds by a *bona fide* holder thereof before maturity, and the levy should not be confined to special assessments on the property improved, although the statute also provides that, to meet the cost of such improvements, the city shall assess abutting property. *United States v. Fort Scott*, 99 U. S. 152.

34. While the charter of Louisiana, Missouri, empowers the city authorities to tax to the extent of one and one half per cent only, the courts may order, as in other cases, the levy of a special tax to pay a judgment against the city. *Louisiana v. United States*, 103 U. S. 289.

35. Mandamus may issue at suit of a party to a contract with a municipal corporation, made upon

**MANDAMUS** — *continued*.

a pledge that the power to tax shall be exercised for its fulfilment, to compel the exercise of that power, the party having no other adequate remedy. *Wolff v. New Orleans*, 103 U. S. 358.

36. Where a statute makes it the duty of a municipal officer, *e. g.* a county clerk, to compute and assess a sum sufficient to meet the liability of a town on certain obligations, and other officials are required to furnish him with information by way of certificates, etc., their failure to do this affords to him no excuse for neglecting to make the necessary computation and assessment, on his being informed by the rendition of judgments against the town that its liability is judicially established, and on his refusal so to do mandamus may issue to compel him. *Hawley v. Fairbanks*, 103 U. S. 543.

37. Mandamus will not issue to compel the payment by a city of a judgment obtained on its bonds, from a fund which the city is authorized by its charter to raise for paying current expenses, not including payments on the bonds, where it does not appear that there will be money enough remaining after paying current expenses. *East St. Louis v. United States*, 110 U. S. 821.

38. The issue of the writ of mandamus to compel those not parties to a judgment to perform a duty arising out of it is not necessarily an exercise of original jurisdiction beyond the power of the circuit courts, — the issue, for instance, of the writ to compel county commissioners, treasurer, clerk, etc., to levy taxes for the satisfaction of a judgment against a township. *Labette County Commissioners v. United States*, 112 U. S. 217.

39. — *When issued to Inferior Courts — To compel Action, but not to control Judgment or Discretion, concerning Pleading, Intervention, Trial, Judgment, Execution, Appeal, Error, Exceptions, etc. — To control Disbarment of Attorneys — In Lieu of Appeal or Writ of Error.* Mandamus will lie to compel a district judge to proceed to the adjudication of a cause. *United States v. Peters*, 5 Cranch, 115.

40. Or to compel him to make entry of a judgment rendered. *Ex parte Bradstreet*, 6 Pet. 774.

41. Or to compel the signing of judgment rendered by the judge's predecessor, where the law requires judgments to be signed, signing being a ministerial act. *New York Life & Fire Insurance Co. v. Wilson*, 8 Pet. 291.

42. But not to compel an entry of judgment on a verdict while a motion for a new trial is regularly under advisement. *Ex parte Bradstreet*, 8 Pet. 588.

43. Nor to compel the setting aside of a judgment by default, that being a matter in the discretion of the court. *Ex parte Roberts*, 6 Pet. 216.

44. Nor to compel an inferior court to amend a judgment which that court has decided requires no amendment. *Ex parte Morgan*, 114 U. S. 174.

45. It will not lie to compel a judge to decide

**MANDAMUS** — *continued*.

otherwise than according to his judgment. *United States v. Lawrence*, 3 Dal. 42; *New York Life & Fire Insurance Co. v. Adams*, 9 Pet. 573; *Ex parte Hoyt*, 13 Pet. 279; *Commissioner of Patents v. Whiteley*, 4 Wal. 522.

46. It will not lie, for instance, to compel a judge to issue a warrant which he in his judicial capacity refused to issue because he considered the evidence insufficient. *United States v. Lawrence*, 3 Dal. 42.

47. Nor will it lie to control the discretion of the inferior court as to proceedings between the institution of a suit and its trial. *Ex parte Bradstreet*, 8 Pet. 588.

48. Where the district court grants a stay of proceedings on suggestion of the district attorney in a case to which the United States is not a party, the court above will award a mandamus nisi in the nature of a *procedendo*. *Livingston v. Dorgenois*, 7 Cranch, 577.

49. Where the district judge sitting in the circuit court in Louisiana was proceeding, although irregularly, in an equity cause, it was held that a mandamus would not lie to compel the court to proceed regularly according to the established practice, and that the only remedy was by appeal from the final decree. *Ex parte Whitney*, 13 Pet. 404.

50. If the court below refuse to execute its decree, where, on appeal, security has been given for a sum insufficient to render the appeal a *superseas*, a peremptory mandamus will issue commanding execution. *Stafford v. Union Bank*, 17 How. 275; *Stafford v. New Orleans Canal & Banking Co.*, Id. 283.

51. Where a writ of error which is a *superseas* has been sued out for the revision of a judgment of ouster on a writ of *quo warranto*, the supreme court will not grant a mandamus to compel execution of the judgment, although the term of office in question will expire before the cause can be heard. *United States v. Addison*, 22 How. 174.

52. Mandamus will not lie to compel a circuit court to hear and determine on the merits an appeal from a decree in a matter which, on hearing, it has decided to be, by treaty, in the jurisdiction of a consul, and not in that of the district court, and where it has reversed the decree and dismissed the libel; and it makes no difference that the sum in controversy is insufficient to give the supreme court appellate jurisdiction. *Ex parte Newman*, 14 Wal. 152.

53. If the circuit court improperly dismiss a case, mandamus will lie to compel the judge to reinstate and proceed to try it. *Ex parte Bradstreet*, 7 Pet. 634. See *Harrington v. Holler*, 111 U. S. 796.

54. Where a circuit court has denied a motion for an order remanding a cause to a state court whence it was removed, mandamus will not lie to compel it to make such order. *Ex parte Hoard*, 105 U. S. 578.



**MANDAMUS — continued.**

55. The allowance of double pleading being not a matter of absolute right, mandamus will not lie to compel an inferior court to permit more than one plea to be filed. *Ex parte Davenport*, 6 Pet. 661.

56. A mandamus will not lie to compel a district judge to permit a party to intervene in a cause which has been remanded without any order to that effect, and to be proceeded in *de novo*. *White v. United States*, 1 Black, 501.

57. The supreme court cannot by mandamus compel an inferior court to reverse a decision made by it in the exercise of its legitimate jurisdiction. *Ex parte Flippin*, 94 U. S. 348; *Ex parte Perry*, 102 U. S. 183.

58. The supreme court will not by mandamus control the exercise of a discretion by the circuit court in a matter within its authority; as, *e. g.*, where the supreme court on appeal has declared that one of two litigants was entitled to priority of occupancy of a certain cañon for its railroad, and directed that an injunction whereby the circuit court has prevented its occupancy be dissolved, and the circuit court, while making a decree recognizing the right, has refused, because of matters set up by the adverse party in supplemental bills, to permit the successful litigant to occupy the cañon until the matters thus set up shall be disposed of, the writ will not issue to compel the circuit court to permit the occupancy. [SWAYNE, FIELD, and BRADLEY, JJ., dissenting.] *Ex parte Denver & Rio Grande Railway Co.*, 101 U. S. 711.

59. Mandamus will lie to compel the allowance of an appeal improperly denied. *United States v. Gomez*, 3 Wal. 752; *Ex parte South & North Alabama Railroad Co.*, 95 U. S. 921.

60. Or to compel the clerk to prepare and deliver the transcript. *United States v. Gomez*, 3 Wal. 752.

61. But not to compel the judges of the circuit court to allow a writ of error, to fix the penalty of a bond, and to sign a citation on the writ, the formal allowance of the writ not being necessary, and it not appearing that application has been made to the judges of that court and of the supreme court to approve security or to sign a citation. *Ex parte Virginia Commissioners*, 112 U. S. 177.

62. Mandamus will lie to a judge of the circuit court, commanding him to sign a bill of exceptions. [BALDWIN and JOHNSON, JJ., dissenting.] *Ex parte Crane*, 5 Pet. 190.

63. But not where his return on an order to show cause declares the bill to be untrue. *Bradstreet v. Thomas*, 4 Pet. 103.

64. A mandamus will lie in a proper case to compel the court of claims to hear and determine a motion for a new trial under the act of June 25, 1868 (15 Sts. 75), which provides that that court may grant new trials on motion in certain cases. *Ex parte United States*, 16 Wal. 699.

65. Whatever the authority of the supreme

**MANDAMUS — continued.**

court to interpose by mandamus in case of suspension of an attorney of an inferior court, the court will not exercise it unless the conduct of the court below has been grossly irregular or flagrantly improper. *Ex parte Burr*, 9 Wheat. 529.

66. A mandamus will not lie to restore an attorney removed for misconduct in the presence of the court, although made without notice or hearing, such removal being the exercise of a judicial discretion vested in the court by law. *Ex parte Secombe*, 19 How. 9.

67. Mandamus is the appropriate remedy to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter. An appeal does not lie in such a case. *Ex parte Bradley*, 7 Wal. 364; *Ex parte Robinson*, 19 Wal. 505.

68. Mandamus will not issue to compel the judge of an inferior court to cause money in the registry of the court to be paid over to an attorney who claims it as his fee, where the judge's return shows that the litigation in the cause is not ended, and that, therefore, the fee is not yet earned. *Ex parte Hughes*, 114 U. S. 147.

69. A writ of mandamus cannot be made to perform the office of a writ of error. *Ex parte Loring*, 94 U. S. 418; *Ex parte Schwab*, 98 U. S. 240; *Ex parte Des Moines & Minneapolis Railroad Co.*, 103 U. S. 794.

70. To compel an inferior court, for instance, to vacate an order setting aside a nonsuit. *Ex parte Loring*, 94 U. S. 418.

71. Or, where the circuit court enjoins the prosecution of a pending suit in a state court, the injunction being a mere incident to the suit in the circuit court, to order the injunction to be vacated. *Ex parte Schwab*, 98 U. S. 240.

72. Mandamus will not issue to an inferior court directing how an issue shall be made up, any error in the proceedings therein being matter for writ of error. *Columbia Bank v. Sweeny*, 1 Pet. 567.

73. Mandamus will not lie to re-examine a decision of a circuit court as to the sufficiency of an affidavit to hold to bail, under a statute authorizing the court to decide thereon. *Ex parte Taylor*, 14 How. 3.

74. Mandamus will not lie to re-examine the refusal of a circuit court, after receipt of a mandate of the supreme court affirming its judgment, to fill a blank in the judgment with the amount of the costs, such refusal being an exercise of judicial power. *Ex parte Many*, 14 How. 24.

75. Mandamus from the supreme court will not lie to reverse a judgment below refusing a mandamus directing the secretary of the treasury to pay a sum of money awarded by the secretary of war pursuant to a joint resolution of congress, and to compel the court below to issue one, the remedy for error in such judgment being by writ of error. *Ex parte De Groot*, 6 Wal. 497.

**MANDAMUS — continued.**

76. The supreme court cannot compel, by mandamus, an inferior court to reverse a decision made in the exercise of its jurisdiction; as, for instance, its decision denying a motion for an attachment for contempt. *Ex parte Burtis*, 103 U. S. 238.

77. A writ of mandamus cannot be used to bring up for review a judgment of the circuit court on a plea to the jurisdiction. Where, therefore, the circuit court quashes and vacates a writ of replevin on a plea to the jurisdiction, as the question may be re-examined by the supreme court on writ of error, a petition for mandamus to compel the circuit court to take jurisdiction will be dismissed. *Ex parte Baltimore & Ohio Railroad Co.*, 108 U. S. 566.

78. — Practice — To whom Writ should be directed — Parties — Service and Return — Hearing — Setting aside Writ — Abatement — Amendment — Necessity for Preliminary Judgment.] A mandamus to compel a city to levy and collect a tax may be directed to the mayor and aldermen, if they constitute the city government, although the city be incorporated by a different name by which it has power to sue and be sued. *Davenport v. Lord*, 9 Wal. 409.

79. And it makes no difference that the relator was a defendant in the suit in the state court, nor that the injunction was issued before the suit in the federal court was brought. *Washington County Supervisors v. Durant*, 9 Wal. 415.

80. In Kansas, counties are capable of being sued, are sued in the name of their county commissioners, and process is served on the clerk of the board. A writ of mandamus, therefore, is properly directed to the board in its corporate capacity, and, when served on the clerk, is served on the corporation; and a change in the membership of the board does not affect its obligation to perform; those who are members when the board is required to act, are those to whom the court will look. *Leavenworth County Commissioners v. Sellow*, 99 U. S. 624.

81. A writ of mandamus to compel the performance of a public duty, as, *e. g.*, to operate a railroad, may issue at the instance of a private relator, without the intervention of the government law-officer, the duty to be enforced not being due to the government as such. *Union Pacific Railroad v. Hall*, 91 U. S. 343.

82. One who has asked and been refused permission to intervene in a suit pending in the circuit court, and who has not acted or been treated as a party thereto, is not entitled to a writ of mandamus to compel that court to allow him to appeal from the decree rendered in the suit; his right to the mandamus resting on his right to appeal, and his right to appeal depending on his having been a party. *Ex parte Cutting*, 94 U. S. 14.

83. Where a state consents to the building of a railroad across navigable waters within its limits, on condition that a drawbridge of a certain

**MANDAMUS — continued.**

kind shall be built and maintained, mandamus may issue on the state's petition to compel the railroad company to comply with the requirement. *New Orleans, Mobile, & Texas Railway Co. v. Mississippi*, 112 U. S. 12.

84. Where, in Kansas, a judgment against a township is rendered in a suit on bonds issued in aid of a railroad, the township trustee is not a necessary party to proceedings to compel, by mandamus, the levy of a tax for the satisfaction of the judgment. The duty of levying the tax devolves on the county commissioners. *Labette County Commissioners v. United States*, 112 U. S. 217.

85. It is no objection to a writ of mandamus to compel the levy of a tax to pay a judgment rendered against a township, that all whose cooperation is required in levying the tax are joined in one writ; as, for instance, the commissioners, clerk, and treasurer of the county. *Ib.*

86. One who asks for a mandamus to an inferior court to make a rule on one of its ministerial officers, must show clearly his interest in the matter on which the application is grounded. *Ex parte Fleming*, 2 Wal. 759.

87. After making a return to an alternative mandamus sued out against him by a judgment creditor of a township, the township supervisor cannot set up the want of service of any notice in the cause. *Edwards v. United States*, 103 U. S. 471.

88. A judge on whom a rule is obtained to show cause why a mandamus should not issue to compel him to sign a certain bill of exceptions, need not swear to the truth of his return of reasons. *Bradstreet v. Thomas*, 4 Pet. 102.

89. On return of a rule to show cause why a mandamus should not issue, the respondent may show cause, whether the other party move or not. *Ib.*

90. A return to a mandamus directing a municipal corporation to levy a specific tax sufficient to pay a specified judgment, stating only a levy of a certain tax to pay the judgment "and other claims," and that the tax is sufficient to pay them, is insufficient; it should disclose the entire act constituting the levy, unembarrassed by other matters, that the court may determine its sufficiency to pay the judgment. *Benbow v. Iowa City*, 7 Wal. 313.

91. On motion for a mandamus to a district judge, if the judge and the adverse party waive the preliminary rule to show cause, and agree to proceed at once to a hearing of the motion, the court may hear the cause, and grant or refuse the writ on its merits. *New York Life & Fire Insurance Co. v. Adams*, 9 Pet. 571.

92. A peremptory mandamus will not be set aside, merely because an alternative writ had not been issued, where the defendant had due notice of the application and made defence. *Knox County Commissioners v. Aspinwall*, 24 How. 376.

**MANDAMUS** — *continued.*

93. Mandamus proceedings to compel the clerk of a township to certify a judgment to the supervisor do not abate either by the resignation of the clerk and the appointment of his successor, or by the expiration of his term of office. *Thompson v. United States*, 103 U. S. 480.

94. In proceedings by mandamus to compel the clerk of a township to certify a judgment to the supervisor, if the fact of the clerk's resignation and his successor's appointment after the cause was at issue can be made available as matter of defence, it must be by plea *puis darrein continuance*, and not as evidence at the hearing. *Ib.*

95. Where, pending a petition for a mandamus to compel the performance of an official duty, the officer goes out of office, a judgment afterwards rendered without revival of the suit is void, and cannot be enforced by a writ directed to him "or his successor in office" ordering performance. *Browning v. McGarrahan*, 9 Wal. 299.

96. In the absence of statutory provision to the contrary, a mandamus against an officer of the government abates on his death or retirement from office; and his successor in office cannot be brought in by way of amendment or on an order for the substitution of parties. *United States v. Boutwell*, 17 Wal. 604.

97. The question of whether the decision of the commissioner of patents, adjudging an applicant for a patent entitled to it, was, on its face, erroneous, cannot be raised in a proceeding to compel, by mandamus, the commissioner to issue the patent. *Butterworth v. United States*, 112 U. S. 50.

98. A rule on a district judge to show cause why a mandamus should not issue, should not be granted unless a *prima facie* case is made by the record or by affidavit. *Postmaster-General v. Trigg*, 11 Pet. 173; *Ex parte Taylor*, 14 How. 3.

99. An application by a private person for a mandamus is founded on the want of other adequate remedy; and, after an award of that writ, the relator cannot maintain an action on the case for the cause for which it was awarded, although he may for neglect to obey it. *Kendall v. Stokes*, 3 How. 87.

100. Although the courts of a state may compel by mandamus the levy of a tax for the payment of overdue coupons on county bonds, without a judgment first being obtained, the rule is otherwise in the federal courts, where mandamus will issue in such a case only in aid of a judgment first obtained. Where, therefore, an action on such coupons is brought in a federal court, it cannot be contended that the action is not maintainable because of the remedy afforded under the state law. *Greene County v. Daniel*, 102 U. S. 187; *Davenport v. Dodge County*, 105 U. S. 237; *Chickaning v. Carpenter*, 106 U. S. 663.

**MANDAMUS** — *continued.*

*Circuit Court in Bankruptcy Proceedings — When it will issue.*

See BANKRUPTCY — JURISDICTION, 7.

*Correlative to Injunction, when.*

See INJUNCTION, 14.

*Costs in Mandamus against Public Officer.*

See COSTS, 41.

*Error to Judgment awarding Mandamus.*

See APPEAL AND ERROR — JURISDICTION, 13.

*Execution — Mandamus to compel Award against Stipulators in Admiralty.*

See JUDGMENT — RENDITION AND ENTRY, 7.

*Issue of Alias Mandamus to enforce an Order for Levy of Tax.*

See COURT — IN GENERAL, 11.

*Judgment — Enforcement — Objections to Ground of Judgment not open.*

See JUDGMENT — CONCLUSIVENESS, 60.

*Judgment — Right thereto for Enforcement against a Town unaffected by Injunction from State Court.*

See COURT — IN GENERAL, 62.

*Judgment of State Courts in Proceedings therefor open to Review on Error.*

See ERROR TO STATE COURT — JURISDICTION, 1, 37.

*Judgment — Will issue to compel Circuit Court to enter according to Mandate.*

See APPEAL AND ERROR — PROCEEDINGS — MANDATE, 4.

*New Trial — Allowance — Mandamus to compel in Court of Claims, etc.*

See COURT OF CLAIMS — PRACTICE, 10, 11.

*Order respecting an Award of the Writ — When final for Purposes of Appeal.*

See APPEAL AND ERROR — JURISDICTION, 155, 158.

*Parties by Intervention may have Writ to enforce Right of Appeal.*

See APPEAL — TAKING AND PERFECTING, 3.

*Patent for Lands — Delivery, when enforced.*

See LANDS OF UNITED STATES — PATENT, 5.

*Proceedings thereon reviewed on Writ of Error.*

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*Question whether Writ shall issue to compel Issue of Warrant for Money under State Statute, etc. — Not federal.*

See ERROR TO STATE COURT — JURISDICTION, 37.

*Refusal of the Writ to compel Payment of Municipal Bonds, when a Bar to a Suit on the Bonds.*

See JUDGMENT — CONCLUSIVENESS, 111 et seq.

**MANDAMUS** — *continued.*

*Secretary of State — Payment of Award under Treaty.*

See **PRESIDENT**, 4.

*Supreme Court District of Columbia — When may issue the Writ.*

See **SUPREME COURT — DISTRICT OF COLUMBIA**, 5.

*Tax — Exercise of Power — Enforcement — Federal Question.*

See **ERROR TO STATE COURT — JURISDICTION**, 155.

*Tax — Levy — Mandamus to compel Municipal Corporation to levy Tax to pay Judgment — Issued by Circuit Court under Process Acts.*

See **FEDERAL COURTS — PRACTICE**, 36.

*Tax — Levy — When Court will issue to compel.*

See **MUNICIPAL BONDS — IN GENERAL**, 87.

*Tax — Levy — When Court will issue to compel.*

See **MUNICIPAL CORPORATION — LIABILITY**, 32-47.

*Tax — Levy — Issue of, to compel.*

See **CONTRACT — IMPAIRMENT OF OBLIGATION**, 52.

**MANDATE** — *Form — Issue — Revocation — Correction.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 535 *et seq.*

*Open to Examination on Second Appeal or Writ of Error.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 307.

*Proceedings thereon.*

See **APPEAL AND ERROR — PROCEEDINGS ON MANDATE**.

**MANOR LANDS** — *Pennsylvania — Confiscation.*

See **LANDS OF STATES — PENNSYLVANIA**.

**MANSLAUGHTER** — *Circuit Court — Jurisdiction — Crime committed within a Foreign State.*

See **CIRCUIT COURT — JURISDICTION**, 19.

*In general.*

See **HOMICIDE**.

**MANUMISSION** — *In Maryland, in general.*

See **SLAVERY**, 19 *et seq.*

**MARINE** — *Who is — Person "enlisted for the Navy."*

See **MARINE CORPS**, 1.

**MARINE CORPS** — *Relation to Navy — Pay and Emoluments.* A marine is a person "enlisted for the navy," within the meaning of the act of March 2, 1837 (5 Sts. 153). *Wilkes v. Dinsman*, 7 How. 89.

**MARINE CORPS** — *continued.*

2. Thus, under that act the commander of a squadron might detain a marine after the expiration of the term for which he enlisted, if the public interests required it. *Ib.*

3. A brevet field-officer of the marine corps is on the same footing in respect to what constitutes his pay and emoluments as a brevet field-officer of infantry of the same grade. *United States v. Freeman*, 3 How. 556.

4. The act of June 30, 1834, § 5 (4 Sts. 712), repealed the joint resolution of May 25, 1832 (4 Sts. 605), respecting the pay and emoluments of the marine corps. *Ib.*

5. In what circumstances a marine officer is entitled to double rations. *Ib.*

*In general — Power of Commander to punish for Insubordination.*

See **NAVY**, 2 *et seq.*

**MARINE INSURANCE** — *In general.*

See **INSURANCE — MARINE**.

**MARINE RISK** — *What the Term covers — Detention by Attachment in Proceedings on Bottomry Bond given to Repair a Leak — Stranding on a Bar — Wrecking by Floating Ice.*

See **CHARTER-PARTY**, 8, 15.

**MARITIME LIEN** — *In general — What subject to Lien — Priorities of Liens — Lien as against Purchaser without Notice.*

See pl. 1-4.

*Lien for Repairs and Supplies in a Foreign Port — Validity of Lien, depending on Necessity, etc.*

See pl. 5-15.

*Lien for Advances — Lien as between Ship and Cargo — Other Cases.*

See pl. 16-27.

*Waiver of Lien — Waiver by Express Contract — By giving Credit, taking Security, etc.*

See pl. 28-36.

*Practice — Recording of Lien under Local Statutes, etc.*

See pl. 37-40.

1. — *In general — What subject to Lien — Priorities of Liens — Lien as against Purchaser without Notice.* There can be a maritime lien only on things movable engaged in navigation, or things the subject of commerce on the high seas or navigable waters, and not on things immovable, as, *e. g.*, a bridge. *The Rock Island Bridge*, 6 Wal. 213.

2. The claims of material-men for supplies are to be preferred to the claim of the government for a forfeiture, when the parties were innocent of all knowledge of, or participation in, the

**MARITIME LIEN — continued.**

illegality of the voyage. *The St. Jago de Cuba*, 9 Wheat. 409.

3. Liens for advances made to the masters of vessels in foreign ports take precedence of prior mortgages to home creditors. *The Emily Souder*, 17 Wal. 666.

4. A purchaser of a vessel subject to a lien for repairs and materials, having no notice of the lien, does not take her discharged of the lien. *The St. Lawrence*, 1 Black, 522.

5. — *Lien for Repairs and Supplies in a Foreign Port — Validity of Lien, depending on Necessity, etc.* Material-men have a lien which may be enforced in the admiralty by a proceeding *in rem* for supplies furnished in a port other than that to which the vessel belongs. *The St. Jago de Cuba*, 9 Wheat. 409.

6. Under the maritime law there is no lien on a vessel for materials furnished and work done in repairing her in a home port. *The General Smith*, 4 Wheat. 438; *The Lottawanna*, 21 Wal. 558 [CLIFFORD, J., dissenting]; *The Edith*, 94 U. S. 518.

7. But otherwise, if the vessel be there held out by her owners as foreign, and the supplies be furnished on the faith of such representation. *The St. Jago de Cuba*, 9 Wheat. 409.

8. For the purposes of a lien for repairs and supplies, a port of a state other than that of the home port is deemed a foreign port, and so a port in which a lien may be acquired. *The Lulu*, 10 Wal. 192.

9. It is no objection to the assertion of a lien for repairs and supplies that the owner was present and gave directions therefor in person, the credit of the vessel having been expressly relied on. *The Kalorama*, 10 Wal. 204.

10. Liens for repairs or supplies, whether express or implied, cannot be enforced in the admiralty without proof that the repairs or supplies were necessary, or, on due inquiry and credible representation, believed to be necessary. *The Grapeshot*, 9 Wal. 129. See *The Guy*, 9 Wal. 758.

11. Where proof is made of necessity for the repairs or supplies, or for funds to pay for them, and of credit given to the ship, a presumption arises of necessity for the credit. *The Grapeshot*, 9 Wal. 129; *The Lulu*, 10 Wal. 192; *The Kalorama*, 10 Wal. 204; *The Custer*, 10 Wal. 204. See *The Guy*, 9 Wal. 758.

12. Necessity for repairs or supplies is proved where such circumstances are shown as would induce a prudent owner, if present, to order them, or provide for them, on the security of the ship. *The Grapeshot*, 9 Wal. 129.

13. Proof that the master ordered the repairs or supplies on the credit of the ship is sufficient proof of necessity therefor to support an implied lien in favor of a material-man who acted in good faith. *The Grapeshot*, 9 Wal. 129; *The Lulu*, 10 Wal. 192. See *The Guy*, 9 Wal. 758.

14. To establish a maritime lien for supplies

**MARITIME LIEN — continued.**

furnished, the libellant must prove not only a necessity for the supplies, but an inability to obtain them except on the credit of the vessel. *Pratt v. Reed*, 19 How. 359; *Tod v. Pratt*, Id. 362.

15. Where supplies are furnished to a ship in a foreign port, to enable her to complete her voyage, and are so used, it is to be presumed that they are furnished on the credit of the ship, and they constitute a lien, unless it can be inferred that the master has funds or that the owner has credit. *The Patapsco*, 13 Wal. 329.

16. — *Lien for Advances — Lien as between Ship and Cargo — Other Cases.* In foreign countries, the general maritime law gives a lien on the ship for supplies and for advances for repairs and necessary expenditures. *The Virgin*, 8 Pet. 538.

17. Where advances to the master of a vessel in a foreign port are made by two different parties, the fact that one of them agreed to advance a portion of the sum after the other had agreed to advance the whole will not affect his lien, the entire sum advanced being necessary. *The Emily Souder*, 17 Wal. 666.

18. Where advances are made to a master in a foreign port on his request, and to pay for necessary repairs or for supplies to enable the vessel to pursue her voyage, the law presumes, in the absence of fraud, that they are made on the credit of the vessel as well as on that of her owner. It is not necessary to a lien therefore that there be an express pledge of the vessel, or a stipulation for credit on her account. *Ib.*

19. And so of advances to pay the expense of necessary towage and pilotage, to pay custom-house dues, consular fees, and for medical attendance on the crew and the like. *Ib.*

20. Such presumption can be repelled only by clear and satisfactory proof that the master had funds applicable to the expenses or credit, his own or that of the owner, on which funds might have been raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the person making the advances, or might have been ascertained by proper inquiry. *Ib.*

21. By the maritime law, the owner of the cargo has a lien on the ship for the safe custody, due transport, and right delivery of the same. *The Maggie Hammond*, 9 Wal. 435.

22. The rule of mutual obligation and mutual lien as between cargo and vessel can have no operation before the cargo is on board the vessel. *Vandewater v. Mills*, 19 How. 82.

23. The law creates no lien on a vessel as security for the performance of a contract to transport a cargo, unless some contract of affreightment has been made. *The Keokuk*, 9 Wal. 517.

24. A contract between the owners of different vessels, for the future employment thereof in the formation of a line for the transportation of

**MARITIME LIEN** — *continued.*

passengers and cargo, each vessel to run over a part of the line and receive a part of the freight, creates no lien. *Vandewater v. Mills*, 19 How. 82.

25. Where there has been a lawful jettison of cargo to save the vessel, the owner of the cargo has a maritime lien on the vessel for its contributory share of the general average compensation. [CATRON and CAMPBELL, JJ., dissenting.] *Du-pont v. Vance*, 19 How. 162.

26. The claim of one furnishing materials to build a ship is not the subject of a maritime lien, — a contract to build a ship is not a maritime contract. *Edwards v. Elliott*, 21 Wal. 532.

27. Such a claimant, therefore, may pursue his common-law remedy or that given by the state law. *Ib.*

28. — *Waiver of Lien* — *Waiver by Express Contract* — *By giving Credit, taking Security, etc.* An express contract cannot be held to waive a lien, unless it contain stipulations from which a waiver may be fairly inferred. *Peyroux v. Howard*, 7 Pet. 324.

29. The giving of credit beyond the time when a vessel may be expected to sail is a waiver of a lien under a local law which provides that the lien shall cease if the vessel be allowed to depart without an assertion of it. *Ib.*

30. The lien of an owner for freight and for a sum agreed to be paid for hire, the charterer being freighter only, may be deemed to have been waived without express words, if there be stipulations inconsistent with the lien, or from which an intention to trust to the personal responsibility of the charterer may fairly be inferred, as, *e. g.*, a stipulation to receive freight at a time and place other than the time and place for the delivery of the cargo. [GRIER and CAMPBELL, JJ., dissenting.] *Raymond v. Tyson*, 17 How. 53.

31. Thus, under a charter-party for a voyage from London direct, or thence to Cardiff in Wales, to load for port or ports on the Pacific, and there to be employed between such ports as the charterer might elect, for the full term of fifteen months, with a privilege to the charterer to extend the time to twenty-four months, the hire being at the rate of two thousand dollars a month, payable in New York, semi-annually, it was held that the owners had no lien on the cargo from Cardiff to the Pacific for the first six months' hire, which became due before the arrival of the vessel at the port of delivery. [GRIER and CAMPBELL, JJ., dissenting.] *Ib.*

32. Acceptance of the owner's notes for repairs and materials furnished is not a waiver of the lien, if not accepted in lieu of the original claim. *The St. Lawrence*, 1 Black. 522.

33. Nor is the lien affected by a receipt of the acceptances of one who calls himself owner and agent of the vessel for the amount charged, the acceptor being insolvent and unworthy of credit, and credit being in fact given to the vessel. *The Guy*, 9 Wal. 758.

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**MARITIME LIEN** — *continued.*

34. The mere bringing of an action in a state court is not a waiver of a lien for repairs and supplies furnished in a foreign port, and, the action being still pending, is no bar to a proceeding in admiralty. *The Custer*, 10 Wal. 204.

35. One who makes advances cannot resort to his general maritime lien, after having taken a bottomry bond which is void for fraud. *Car-rington v. Pratt*, 18 How. 63.

36. If the New York statute of April 24, 1862, giving a lien on vessels for repairs in the home port, be valid, the bond provided for when given by the owner is a substitute for the lien and discharges the vessel. *The Edith*, 94 U. S. 518.

37. — *Practice* — *Recording of Lien under Local Statutes, etc.* On a proceeding in rem to enforce a specific lien it is for the libellant to make out the existence of the lien. *The General Smith*, 4 Wheat. 438.

38. Material-men, claiming a lien on a vessel under a local law, cannot enforce such lien if they have failed to record it as required by that law. *The Lottawanna*, 21 Wal. 558.

39. While the changes made in 1872 in the twelfth admiralty rule were not intended to create new liens, but simply to remove embarrassments in the way of enforcing those existing, one whose libel was filed before the adoption of the new rule could have no benefit therefrom. *Ib.*

40. He who asserts a lien under the New York statute of April 24, 1862, for repairs to a vessel in the home port, must show that he has instituted proceedings for its enforcement within the time limited. *The Edith*, 94 U. S. 518.

*Cargo* — *Lien on, for Contribution in General Average* — *Discharged by Delicery.*

See ADMIRALTY — JURISDICTION, 70.

*Enforcement in the Admiralty.*

See ADMIRALTY — JURISDICTION, 44 *et seq.*

*In general.*

See CARRIER — LIEN; COMMERCE, 10.

*State cannot create* — *Nor confer on State Court Jurisdiction to enforce.*

See STATES — RIGHTS AND POWERS, 6.

*Vessel* — *Lien on, for Value of Jettisoned Cargo enforceable by Proceedings in Rem.*

See ADMIRALTY — JURISDICTION, 77.

*Work, etc.* — *Lien for, on Prize not enforceable by Attachment, but must be adjusted in Prize Court.*

See PRIZE — JURISDICTION, 19.

**MARITIME PRIZE** — *What constitutes* — *In general.*

See CAPTURE — LAWFUL PRIZE, 23.

**MARRIAGE** — *What constitutes* — *How proved* — *Evidence.* Quære, whether, in Georgia and South Carolina, an agreement to marry, made in

**MARRIAGE — continued.**

the presence of friends, and followed by cohabitation, amounts to a valid marriage. *Jewell v. Jewell*, 1 How. 219.

2. In the Spanish colony of Louisiana, an actual contract of marriage, made before a civil magistrate, without the presence of a priest, followed by acknowledgment and cohabitation, was valid. *Hallett v. Collins*, 10 How. 174.

3. A marriage between a woman and a man who has a wife living is void, and, whether judicially so declared or not, imposes no restraint on marriage by the woman. *Patterson v. Gaines*, 6 How. 550.

4. In the District of Columbia, a marriage celebrated by a clergyman *in facie ecclesie* is valid without a license. *Blackburn v. Crawford*, 3 Wal. 175.

5. The supreme court of Michigan has declared that, notwithstanding a failure to comply with directions prescribed by the state statute concerning the solemnization of marriages, a marriage may be valid. *Meister v. Moore*, 96 U. S. 76.

6. A marriage valid at common law is valid, although the statute of the state where it is contracted prescribes directions respecting its solemnization which have not been complied with, unless the statute contains express words of nullity. *Ib.*

7. What amounts to proof of marriage. *Blackburn v. Crawford*, 3 Wal. 175.

8. Proof of marriage must be according to the law of the place where the marriage took place. *Patterson v. Gaines*, 6 How. 550.

9. The fact of marriage may be proved by any one who was present at the ceremony and can identify the parties. *Ib.*

10. If the ceremony were performed by a person habited as a priest, and *per verba de presenti*, the presumption is that he was a clergyman. *Ib.*

11. On an issue as to the marriage of a man and woman living together in a state where, as in Pennsylvania, a marriage is a mere civil contract, as at common law, to be made *per verba de presenti*, without any attending ceremony, the proof, in the absence of statute, should show some public recognition of the existence of the marital relation. *Maryland v. Baldwin*, 112 U. S. 490.

12. The certificate of a priest, given sixteen years after the alleged second marriage, that he married the husband to the alleged former wife, is not admissible, there being no register thereof in the records of the church, to disprove the validity of the second marriage. *Gaines v. Relf*, 12 How. 472.

13. Where the church keeps no official record of marriages, a private memorandum kept by the clergyman, in which he has entered or intended to enter all marriages by him celebrated as they occurred, is admissible to prove that a particular marriage, of which there was no entry,

**MARRIAGE — continued.**

was not celebrated by him, as alleged. *Blackburn v. Crawford*, 3 Wal. 175.

14. But the memorandum itself, or a proved copy, should be produced. *Ib.*

15. The marriage being admitted, the admission of the husband that at the time of the marriage he had a lawful wife living is not admissible in evidence to invalidate it as against third persons having an interest therein. *Gaines v. Relf*, 12 How. 472. See *Gaines v. Hennen*, 24 How. 553.

16. The fact that a man and woman do not cohabit does not tend to disprove the existence of a marriage once clearly proved. *Union Packet Co. v. Clough*, 20 Wal. 528.

**Bona Fides as affecting the Validity.**

See LEGITIMACY, 6.

**Charge to Jury on Issue of.**

See TRIAL — TRIAL BY JURY, 38.

**Communications to Attorney concerning — What not privileged.**

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**Decisions of State Courts respecting Marriage Laws — Followed by Federal Courts.**

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 47.

**Decree of Foreign Court annulling Marriage — Validity — Federal Question.**

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**Polygamous Marriages — In general.**

See BIGAMY.

**Promises in Consideration of — Statute of Frauds.**

See FRAUDS, STATUTE OF, 23.

**Proof on Trial for Bigamy.**

See BIGAMY, 3.

**MARRIAGE SETTLEMENTS — Property embraced — Subsequently acquired Property — Record, Necessity, and Effect — Construction.]**  
The deed of settlement may provide for the subsequently acquired property of either party. *Neres v. Scott*, 9 How. 196.

2. In New Jersey, marriage settlements are not required to be recorded. *Magniac v. Thompson*, 7 Pet. 348.

3. In Louisiana, although the law requires ante-nuptial contracts to be recorded, they are good *inter partes*, if not recorded. *De Lane v. Moore*, 14 How. 253.

4. And if recorded after the statute period, they will operate as constructive notice to creditors and purchasers from the date of the record. *Ib.*

5. Such a contract, duly made and recorded in the state where the parties reside and where the property is, will continue to bind the property as against creditors and purchasers, although the parties afterwards remove with the property to another state. *Ib.*

**MARRIAGE SETTLEMENTS — continued.**

6. An executed marriage settlement is to be expounded on principles applicable to other deeds. *Adams v. Law*, 17 How. 417.

7. Where a marriage settlement directed the trustees to invest a fund, to raise a jointure for the wife, in one of several specified securities, with the wife's approbation, it was held that the wife might choose between such investments, and that the trustees were bound to conform to her election. *English v. Foxall*, 2 Pet. 595.

8. But if she were to act from mere caprice, or with intent to impose a loss on the estate, perhaps a court of equity would control her action. *Ib.*

9. And where, in such case, the husband confirmed the settlement in his will, and directed that any deficiency in the widow's annuity be made up out of the residuum of his estate, it was held that she was entitled to have a deficiency so made up, although caused by her election of security. *Ib.*

10. A marriage settlement conveyed land to the use of the husband and wife and the survivor of them during their natural lives, then to the use of the children of the marriage, their heirs and assigns forever, but if the husband died in the lifetime of the wife without issue then living, then to the use of the wife, her heirs and assigns forever. It was held that each child when born took a vested remainder in fee, subject to open and let in after-born children; that such vested estate in fee was defeasible on the contingency of the wife's survival of the husband without issue; that there was no objection to such limitation of a fee upon a fee by way of shifting use; that the existence of the executory limitation over to the wife did not render the precedent estate a contingent remainder, but a defeasible although vested fee, the contingency attaching not to the prior, but to the subsequent, estate. *Carver v. Astor*, 4 Pet. 1; *Crane v. Morris*, 6 Pet. 598; *Kelly v. Morris*, 6 Pet. 622.

11. An ante-nuptial agreement that all the property of the parties should "remain in common between them" during their natural lives, and continue to be the property of the survivor so long as he or she might live, and on his or her death to be divided between the heirs of the two, "share and share alike," agreeably to the local laws of distribution, was held to be an executed trust which equity would enforce for the benefit of collateral kindred. *Neves v. Scott*, 9 How. 196; *Neves v. Scott*, 13 How. 268.

12. Where, from the circumstances under which marriage articles were executed, or from the articles themselves, it appears to have been intended that in a certain event collateral relations should take, and the articles contain a proper limitation to that effect, equity will enforce the trust for the benefit of such relations, although no trustee were interposed between the parties. *Ib.*

13. Where, by a marriage settlement the declared object of which is to provide a jointure and

**MARRIAGE SETTLEMENTS — continued.**

not to make a settlement on the issue of the marriage, property is conveyed to a trustee for the use of the husband for life, then for the use of the wife for life, and in case of the death of the wife in the lifetime of the husband leaving issue of the marriage, one or more children then living, then, after the death of the husband, upon trust for the child or children of the intended marriage, and the wife dies in the lifetime of the husband leaving no children but only grandchildren surviving, the grandchildren will not take. *Adams v. Law*, 17 How. 417.

14. Actual maintenance by the husband is, in general, a satisfaction of an ante-nuptial promise to pay an annual sum therefor, if the parties live together and no claim be made in the husband's lifetime. *Hunter v. Bryant*, 2 Wheat. 32.

**MARRIED WOMAN — Powers, Liabilities, etc. —**

*In general.*

See HUSBAND AND WIFE.

**MARSHAL — Powers, Duties, and Liabilities.**

See pl. 1-19.

*Fees — Right to — How paid.*

See pl. 20, 21.

*Actions — Evidence — Damages.*

See pl. 22-25.

1. — *Powers, Duties, and Liabilities.*] It is irregular for the marshal to keep property labelled for forfeiture, or its proceeds, in his hands, or to distribute the same without a special order; but such an irregularity may be cured by assent and ratification of the parties, if there be no *mala fides*. *The Collector*, 6 Wheat. 194.

2. The marshal is bound to serve process as soon as he reasonably can. *Kennedy v. Brent*, 6 Cranch, 187.

3. The marshal of the District of Columbia is not bound, under the acts of February 27 and March 3, 1801 (2 Sts 103, 115), to apply to the district attorney for executions for fines and costs, nor is he liable for omitting to do so, it being the duty of the district attorney to put the process in his hands. *Washington Levy Court v. Ringgold*, 5 Pet. 451.

4. A marshal is bound to complete a levy begun during his term of office, although not completed on its expiration; and he remains subject to all legal remedies in favor of the execution creditor. *McFarland v. Gwin*, 3 How. 717.

5. A marshal may sue on an attachment bond for the use of the plaintiffs in the original action after he has gone out of office. *Huff v. Hutchinson*, 14 How. 586.

6. The marshal is not liable for the escape of a debtor whom he has committed to a state jail. *Randolph v. Donaldson*, 9 Cranch, 76.

7. A marshal is discharged from liability for money received on execution, by payment over under direction of the comptroller of the treasury,



**MARSHAL — continued.**

without submitting it as a claim to the accounting officers of the treasury. *United States v. Giles*, 9 Cranch, 212.

8. If a marshal, before the date of his bond, receive on execution money due to the government, with orders from the comptroller to pay it into bank, and neglect so to pay it, the sureties in his bond, executed afterwards, are not liable therefor although the money remain in the marshal's hands. *Ib.*

9. Where the marshal is one of the persons required under a mandate of the supreme court to make restitution of the proceeds of property confiscated and sold, he may protect himself by showing a deposit in bank under directions from the government. *Ex parte Morris*, 9 Wal. 605.

10. Right of action on a marshal's bond cannot accrue to a party plaintiff to whom the marshal neglects to pay over the proceeds of an execution, while proceedings in the cause are suspended by an appeal. *Montgomery v. Hernandez*, 12 Wheat. 129.

11. A marshal who received bank-notes in satisfaction of an execution, held liable to the creditor for the amount in specie. *Gwin v. Breedlove*, 2 How. 29.

12. The marshal has no authority under the law to receive depreciated currency in discharge of an execution; and if he do so he is liable to the execution creditor. *McFarland v. Gwin*, 3 How. 717.

13. If the execution creditor direct the deputy marshal to receive payment in depreciated currency, the deputy acts, not as deputy, but as agent of the creditor, and the marshal is not liable for his delay in paying over. *Gwinn v. Buchanan*, 4 How. 1.

14. If the deputy marshal do that which discharges the sureties in a replevin bond, the marshal will not be liable therefor if the plaintiff's attorney did that, although without giving positive instructions, which misled the deputy, and induced the act; and in considering that, it should be remembered that the deputy is a ministerial officer unacquainted with rules of law with which the attorney is supposed to be familiar. *Rogers v. The Marshal*, 1 Wal. 644.

15. Nor will the marshal be liable, if the plaintiff's attorney subsequently ratify the act which operates such a discharge, as the attorney may bind his client to that extent. *Ib.*

16. A writ which directs the marshal to take specific property leaves him no discretion as to what he shall take, and, therefore, if the court have jurisdiction, the writ will protect him; but if it merely command him to make a certain sum out of the debtor's property, he must determine for himself whether the property he takes is legally liable, and the writ will afford him no protection, if he take the property of a stranger to the writ. *Buck v. Colbath*, 3 Wal. 334.

17. For such a trespass a marshal is liable in any court of competent jurisdiction, whether state or federal. *Ib.*

**MARSHAL — continued.**

18. The taking, by a marshal, in attachment on meane process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable. *Lammon v. Feusier*, 111 U. S. 17.

19. The marshal of the District of Columbia, held not liable for interest on money to which the levy court was entitled, expended in repairing the jail, under sanction of the treasury department. *Washington Levy Court v. Ringgold*, 5 Pet. 451.

20. — *Fees — Right to — How paid.* The marshal of the District of Columbia, under the law of Maryland, in force in Washington County, is entitled to poundage on an execution in favor of the United States, in a cause in the circuit court for that county; and if the government discharge the debtor from imprisonment, it becomes liable to the marshal therefor. *United States v. Ringgold*, 8 Pet. 150.

21. The marshal's fees, when properly chargeable to the government, are to be paid out of the treasury on a certificate of the court or one of the judges. *The Antelope*, 12 Wheat. 546.

22. — *Actions — Evidence — Damages* The dockets and records of a court which show, in the modes usual in that court, the receipt of money by the marshal are evidence against his sureties. *Williams v. United States*, 1 How. 290.

23. In a suit against a marshal by one claiming to be the owner of goods attached, the writ under which the marshal seeks to justify is admissible in evidence, although the affidavit is defective; and it is sufficient to protect the marshal in a collateral proceeding, if the property seized under it was liable to be attached in the suit. *Matthews v. Densmore*, 109 U. S. 216.

24. The owner of property sought to be confiscated can recover only nominal damages in an action against the marshal for a false return where, although the proceedings have been carried through to a formal sale, the monition was so framed and the process so served that the owner's title was not divested. *Pelham v. Way*, 15 Wal. 196.

25. The measure of damages in trespass against a marshal for an illegal levy is the value of the goods at the time of the levy, with interest from the expiration of the usual credit on extensive sales. *Conard v. Pacific Insurance Co.*, 6 Pet. 262. See *Conard v. Nicoll*, 4 Pet. 291.

*Action against, for False Return by Deputy — Not survive.*

See ACTION, 16, 17.

*Action against, for levying on Property of one other than Execution Debtor — Not removable from State Court.*

See REMOVAL OF CAUSES, 21.

*Action against, for levying on Goods not Property of Execution Creditor — Federal Question not invalid.*

See ERROR TO STATE COURT — JURISDICTION, 57, 109, 110.

**MARSHAL** — *continued.*

*Bond — Action on — Federal Question.*

See **ERROR TO STATE COURT — JURISDICTION**, 117.

*Bond — Action — Federal Question — Removal from State Court.*

See **REMOVAL OF CAUSES**, 43.

*Deed in Confiscation Proceedings — What passes.*

See **CONFISCATION**, 50.

*Distribution of Proceeds of Sale — Order — When final for Purposes of Appeal.*

See **APPEAL AND ERROR — JURISDICTION**, 151, 152.

*Elections of Members of Congress — May attend, and keep the Peace.*

See **CIVIL RIGHTS**, 31.

*Execution — Justification thereunder — Levy — Sale of Property, etc.*

See **EXECUTION**.

*Execution — Levy and Sale thereunder to conform to State Practice.*

See **FEDERAL COURTS — PRACTICE**, 38.

*Execution — Must not receive Depreciated Currency on.*

See **EXECUTION**, 9.

*Execution — Sale thereon after Removal of Marshal from Office.*

See **EXECUTION**, 30.

*Indictment for Crime alleged to have been committed by one assisting in an Arrest, removable from State Court.*

See **REMOVAL OF CAUSES**, 16.

*Judgment by Motion against, for failing to pay over.*

See **FEDERAL COURTS — PRACTICE**, 23.

*Mandamus — When will not issue to compel Levy of Execution.*

See **MANDAMUS**, 24.

*Officer de Facto, when — Validity of Acts.*

See **OFFICER**, 6.

*Possession the Possession of the Court.*

See **COURT — IN GENERAL**, 50.

*Power under Warrant issued in Bankruptcy Proceedings.*

See **BANKRUPTCY — PROCEEDINGS TO CONVERT ESTATE**, 2.

*Sales under Order of Court, etc. — In general.*

See **JUDICIAL SALE**.

*Service of Process — In general.*

See **WRIT AND PROCESS**.

*Trespass by — When he may maintain for Property taken out of his Possession by Sheriff — When defend in Replevin.*

See **COURT — IN GENERAL**, 52, 57.

**MARSHALLING** — *Assets — Realty and Personality — Priorities.*

See **EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES**, 69 *et seq.*

**MARSHALLING** — *continued.*

*Party having right to resort to Two Funds, paid out of one, etc.*

See **EQUITY — JURISDICTION**, 34.

*Priorities — Postponement of Liens.*

See **PARTNERSHIP**, 69.

*Securities — Mortgagee entitled to Payment out of either of Two Funds.*

See **MORTGAGE — MORTGAGEE**, 7.

**MARTIAL LAW** — *In general.*

See **ARMY; WAR**.

*State may declare — When.*

See **STATES — RIGHTS AND POWERS**, 1.

**MARYLAND** — *Lands of the State.*

See **LANDS OF STATES — MARYLAND**.

**MASSACHUSETTS** — *Boundary between, and Rhode Island.*

See **STATES — BOUNDARIES**, 2.

**MASTER** — *Vessel — Powers, etc., in general.*

See **SHIPPING — MASTER**.

**MASTER AND SERVANT** — *Master's Liability for Servant's Tort.*

See pl. 1.

*Master's Liability for Negligence of Independent Contractor.*

See pl. 2-8.

*Master's Liability for Accidental Injury of Servant — How limited by Negligence of Fellow-servant.*

See pl. 9-19.

**1. — Master's Liability for Servant's Tort.]**

A master is liable for the tortious acts of his servant, if done in the course of his employment, although in disobedience of the master's orders. *Philadelphia & Reading Railroad Co. v. Derby*, 14 How. 468.

**2. — Master's Liability for Negligence of Independent Contractor.]**

If a railroad company engage with a contractor for the construction of a bridge across a river, and the construction involve the driving of piles, and the company abandon the undertaking and discharge the contractor, leaving concealed piles in the channel to the peril of passing vessels, and a vessel be thereby injured, the company, and not the contractor, will be liable therefor. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 23 How. 209.

**3.** The principal, the person for whom a wharf or other work is being constructed, is liable for an injury caused by negligence in the manner in which the work is constructed or protected, where the act is that of an agent in the course of his employment; it is only when the actor is not a servant or agent, but is himself the master,

**MASTER AND SERVANT — continued.**

that the principal is not responsible. *New Orleans, Mobile, & Chattanooga Railroad Co. v. Hanning*, 15 Wal. 649.

4. Thus, a railroad company for which one has contracted to build a wharf is liable for an injury caused by the negligence of the contractor or of his employees, where the contract is that the contractor shall furnish materials and labor, put in posts, piles, etc., as the company may require, making an old wharf as good as new, and a new one in the most workmanlike manner, and shall submit to the supervision and direction of the company's engineer, and do the work to his satisfaction. The company has control of the work, and the contractor is its agent. *Ib.*

5. If an area dug in front of a building in process of erection on a city lot be left uncovered, without guards, and without lights to warn passers-by, so that one falls in and is injured, and recovers therefor in an action against the city, the owner will be liable over to the city, notwithstanding any agreement between him and the contractor for the erection of the building, that in such case the latter should be liable. *Chicago v. Robbins*, 9 Black, 418.

6. Where work done on the border of a public highway necessarily constitutes an obstruction or defect in the highway which renders it dangerous unless properly guarded or shut out from public use, the principal for whom the work is done cannot evade his liability for injuries caused thereby by proving that the work was done by an independent contractor: it is only when the obstruction or defect is collateral to the work contracted for, and wholly the result of the wrongful act of the contractor, that the owner is absolved. *Ib.*; *Robbins v. Chicago*, 4 Wal. 657.

7. Where an incorporated company undertakes to lay pipes in the streets of a city, agreeing to "protect all persons against damages," etc., and to be "responsible for all damages which may occur by reason of the neglect of its employees in the premises," it will be liable to a person who, in passing through a street in which pipes are being laid, is injured through the negligence therein of the servants of one to whom it has sublet the entire contract, and who has the immediate supervision of the work. *St. Paul Water Co. v. Ware*, 16 Wal. 566.

8. Where the nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable; but if the act which is the subject of complaint is purely collateral to the matter contracted to be done, and arises indirectly in the course of the performance of the work, the employer is not liable, because he never authorized the work to be done. *Chicago v. Robbins*, 9 Black, 418; *Robbins v. Chicago*, 4 Wal. 657; *St. Paul Water Co. v. Ware*, 16 Wal. 566.

9. — *Master's Liability for Accidental Injury of Servant — How limited by Negligence of*

**MASTER AND SERVANT — continued.**

*Fellow-servant.*] A master, sued by his servant for injuries resulting from defective machinery, cannot defend by showing that the negligence in permitting the machinery to remain defective was that of an agent to whom the duty of supervising it had been delegated; a railroad company, therefore, may be liable to an engineer for injuries sustained by reason of defects in an engine, notwithstanding the negligence was that of the company's master mechanic and foreman of the round-house. *Hough v. Texas & Pacific Railway Co.*, 100 U. S. 213.

10. An engineer who uses an engine after knowledge of a defect therein, of which he has given notice and which his employers have promised to remedy, does not thereby necessarily preclude himself from a recovery for injuries caused by an accident to which the defect contributed. It is for the jury to say whether, under the circumstances, his conduct was reckless; and the burden of proving this is upon those asserting it. *Ib.*

11. The rule which exempts the master, whether a person or a corporation, from liability to a servant for injuries caused by the negligence of a fellow-servant, is limited by the obligation of the master to protect the servant from peril, as, for instance, from defects in machinery provided for his use, so far as he can by proper diligence. *Ib.*

12. In selecting its telegraph operators, a railroad company is bound to exercise the same degree of care as in providing and maintaining its machinery; not such care, merely, as other railroad companies ordinarily exercise, but such care as the exigencies of the service require. *Wabash Railway Co. v. McDaniels*, 107 U. S. 454.

13. The duty of a master to provide safe structures for his men to work on, is to be reasonably construed. He is not necessarily responsible if a structure, *e. g.* a building in process of erection, is not at all times absolutely safe; as, for instance, when the temporary insecurity at the time of an accident is due to risks incident to the unfinished state of the work or to negligence of fellow-workmen. *Armour v. Hahn*, 111 U. S. 313.

14. If a railroad workman, instead of riding in the car provided, where he would escape injury, jump upon the pilot of the engine, because ordered to "hurry," "to get on anywhere," and is injured by a collision, he cannot hold the company liable, he being thereby guilty of negligence, and the company, although bound to a high degree of care, not standing in the position of an insurer. *Baltimore & Potomac Railroad Co. v. Jones*, 95 U. S. 439.

15. In an action against an employer for personal injuries caused by the negligence of those who were or had been the fellow-servants of the person injured, the question whether that person's employment had ceased is a question for

**MASTER AND SERVANT — continued.**

the jury in view of the nature of the employment, the manner of engaging and discharging the hands, and the other circumstances of the case, the facts as to the employment being undisputed, and the only question being as to whether the employment had ceased; as, for instance, in the case of a man employed at a wharf for an hour or two in lading a vessel, and injured in going ashore after the work was done and he was paid. *Northwestern Packet Co. v. McCue*, 17 Wal. 508.

16. An instruction, on the trial of an action against a railroad company by a servant injured by an accident, that if the negligence of the company had a share in producing the injury, the company was liable, although the negligence of a fellow-servant also contributed, is correct. *Grand Trunk Railway Co. v. Cummings*, 106 U. S. 700.

17. Under the rule exempting corporations from liability to their servants for the fault of their fellow-servants, a brakeman cannot maintain an action against the corporation for an injury received while using a switch, and caused by the negligence of an engine-man of another train in running his engine too fast, or in not giving due notice of its approach. The two are fellow-servants. *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478.

18. The rule that a master is not liable to a servant for personal injury caused by the negligence of a fellow-servant, whether sound or not, has no application where the injury is received while the servant is doing work outside of his contract of employment, by direction of his fellow-servant who is at the time acting within the scope of his powers; as, for instance, where the servant is a boy employed as a helper on the floor of a shop under the direction of his fellow-servant, and is injured while, acting outside of the contract of employment, he is adjusting a misplaced belt to rapidly revolving and dangerous machinery, at a great height from the floor, by the order of his fellow-servant. [BRADLEY, J., dissenting.] *Union Pacific Railroad Co. v. Fort*, 17 Wal. 553.

19. A conductor who has charge of a train, and commands its movements, represents the railroad company, and is not a fellow-servant of the engineer in such sense as to preclude a recovery by the latter against the company for an injury resulting from the conductor's negligence. [BRADLEY, MATTHEWS, GRAY, and BLATCHFORD, JJ., dissenting.] *Chicago, Milwaukee, & St. Paul Railway Co. v. Ross*, 112 U. S. 377.

**Patent — Servant, when entitled to Letters.**

See PATENT — ISSUE; PATENT — LICENSE, 9.

**Railroad Company — Liability for Act of Servant.**

See RAILROAD — COMPANY, 11.

**MASTER IN CHANCERY — Power in Equity to examine Witnesses Viva Voce.**

See EQUITY — ACCOUNTING, 6.

**Sale and Conveyance under a Decree in Equity as effectual as Sale and Conveyance by a Sheriff in Proceedings at Law.**

See JUDICIAL SALE, 24.

**MATERIAL-MEN — Lien — In general.**

See MARITIME LIEN.

**MATURITY — Meaning of the Word.** In general, the word "maturity," as applied to bonds and similar instruments, means the time fixed for payment. *United States v. Union Pacific Railroad Co.*, 91 U. S. 72.

**MEASURE OF DAMAGES — In general.**

See DAMAGES.

**MECHANIC'S LIEN — Where the Lien exists — Property subject — Who entitled — Who may enforce — What he must show — Priorities — Waiver, etc.]** The California statute giving mechanics a lien on aqueducts "which they may have constructed or repaired," held not to give contractors, for an extension of an aqueduct, a lien on the part already constructed, where that part was in use and at times sufficient for its purpose, and the extension was necessary merely to secure a more full and constant supply of water. [GRIER, MILLER, and FIELD, JJ., dissenting.] *South Fork Canal Co. v. Gordon*, 6 Wal. 561.

2. That provision of the statute which requires suit to be brought within a year after work done, in order to preserve the lien, was held to be met where the contractors gave notice on June seventh that the contract was at an end for default in payment, but said that they would continue work a week to await an arrangement, trusting to the honor of the other party for payment, and then discontinue if satisfactory arrangements were not made, and, having heard nothing, discontinued accordingly on the thirteenth, insisting again that the contract was at an end, — suit being brought on June twelfth of the next year. *Ib.*

3. Where a building contract treats a row of buildings as an entirety, they may be deemed one building for the purposes of a mechanic's lien thereon; the claim of lien need not be of a lien on each building separately. *Phillips v. Gilbert*, 101 U. S. 721.

4. The act of March 2, 1833 (4 Sts. 659), does not give a lien to one who contracts to erect a building, but to mechanics and material-men only. *Winder v. Caldwell*, 14 How. 434.

5. Under a statute giving a lien to mechanics who, by virtue of "any contract" with the owner of any building, have performed labor or furnished materials, etc., one who furnishes materials under an agreement for the conveyance to him of real estate at a stated price per foot in payment therefor, is entitled to a lien, if the statutory notice be

**MECHANIC'S LIEN** — *continued.*

seasonably given. *McMurray v. Brown*, 91 U. S. 257.

6. Under the Montana civil practice act, which provides that actions shall be prosecuted in the name of the real parties in interest, where a mechanic assigns a claim which he has completed by filing a lien, the assignee may institute proceedings in his own name, to enforce it. *Davis v. Bilsland*, 18 Wal. 659.

7. One seeking to enforce a mechanic's lien must show clearly a substantial compliance with the provisions of the statute giving the lien, and must fix with certainty the time when the work was begun and finished. *Davis v. Alvord*, 94 U. S. 545.

8. Under section 8 of the mechanic's lien law of Montana, liens secured to mechanics and materialmen have precedence over all other incumbrances put on the property, after the beginning of the building. *Davis v. Bilsland*, 18 Wal. 659.

9. Where it is apparent from the written agreements between a builder and the owner of the estate that the builder relied on security other than a mechanic's lien, there is no lien, and the subsequent relinquishment of such security for an unsecured note can create none. [SWAYNE, J., dissenting.] *Grant v. Strong*, 18 Wal. 623.

10. Where a statute makes provision for the discharge of a mechanic's lien on the filing of an undertaking by the owner of the land, but makes no special provision for enforcing the liability of the sureties on the undertaking, a personal decree only can be taken against the owner in a suit in equity to enforce the lien: the liability of the sureties must be enforced by an action at law on the undertaking. *Phillips v. Gilbert*, 101 U. S. 721.

*Suit to enforce essentially a Suit in Equity.*

See APPEAL AND ERROR—JURISDICTION, 47.

**MEMORANDUM** — *Private, in Evidence.*

See EVIDENCE—DOCUMENTARY.

*Refreshing Recollection of Witness.*

See WITNESS.

*Sale, etc. — Statute of Frauds.*

See FRAUDS, STATUTE OF.

*Statute of Frauds — What will satisfy.*

See FRAUDS, STATUTE OF.

**MERCHANDISE** — *What is, within the Meaning of the Spanish Treaty of 1795.*

See TREATY, 33.

**MERCHANT** — *Merchant's Accounts. Exception thereof in Statute of Limitations — What are, etc.*

See LIMITATION—EXCEPTIONS AND INTERRUPTIONS, 28 *et seq.*

**MERCHANT** — *continued.*

*Pleading under Statute of Limitations.*

See LIMITATION—PLEADING AND PRACTICE, 4.

*Property in Enemy's Country — Removal.*

See CAPTURE—LAWFUL PRIZE.

**MERGER** — *Contracts, etc. — Merger, in general.*

See CONTRACT—MODIFICATION AND MERGER, 10-12.

*Executory Devise — Merger in Precedent Estate.*

See DEVISE AND LEGACY, 46.

*Judgment — Merger of.*

See JUDGMENT—MERGER.

*Lien for Payment of Railroad Bonds—Merged in Title of Purchaser.*

See RAILROAD—MORTGAGE, 42.

*Liability of Receiver of Public Money not merged in his Bond.*

See RECEIVER OF PUBLIC MONEY, 15.

*Mortgagee Owner of Equity of Redemption.*

See MORTGAGE—MERGER.

*Negotiation merged in Written Contract.*

See CONTRACT—WHAT CONSTITUTES.

*Remedy in Admiralty for Piratical Seizure — Civil Remedy not merged.*

See ADMIRALTY—JURISDICTION, 80, 81.

*Securities — Merger of Mortgage Note in Judgment — Effect.*

See MORTGAGE—POWER OF SALE.

*Securities — Merger of.*

See NOVATION.

*Simple Contract — When merged in Deed.*

See CONTRACT—MODIFICATION AND MERGER, 7, 9.

*State's Lien for Taxes — When merged — Sale for Taxes — State's Bid bought by Owner.*

See TAX—COLLECTION, 21.

**MESNE PROCESS** — *In general.*

See ATTACHMENT; WRIT AND PROCESS.

**MESNE PROFITS AND IMPROVEMENTS** —

*Right thereto — How enforced.*] It is competent for a state legislature to deprive the plaintiff in ejectment of his right to recover mesne profits as a consequence of his recovery, and to prescribe the terms on which they shall be recoverable. *Society for Propagation of the Gospel v. Pavolet*, 4 Pet. 480.

2. One who has held possession of land *mala fide* is chargeable on a claim for mesne profits with what the premises are reasonably worth annually, and with interest thereon to the time of trial. *New Orleans v. Gaines*, 15 Wal. 624.

3. Trespass for mesne profits will lie against one who was landlord in fact, and who actually defended in ejectment, although not the defend-

**NEENE PROFITS AND IMPROVEMENTS — continued.**

ant of record, and although another were admitted to defend as landlord with the plaintiff's consent. *Chirac v. Reinicker*, 11 Wheat. 280.

4. A defendant in ejectment in the circuit court is not deprived of the benefit of a local law under which he is entitled to the value of his improvements, to be ascertained by commissioners to be appointed by the court, by the constitutional inability of the court to dispense with the jury in such cases, as he may have complete relief in equity. *Hamilton Bank v. Dudley*, 2 Pet. 492.

5. In Louisiana, where one who has held possession *mala fide* may be allowed the cost of his improvements if the owner of the premises elects to keep them, the court may deny a specific payment where, in fact and in good conscience, the possessor has received their value, and where the case is such that a specific estimate cannot be made. *New Orleans v. Gaines*, 15 Wal. 624.

6. In Mississippi, one may have purchased land in "good faith," within the meaning of that term as used in the statute and construed by the courts of the state, so as to entitle him to the value of his improvements if ejected by one holding a paramount title, although the existence of such paramount title might have been ascertained by research. *Canal Bank v. Hudson*, 111 U. S. 66.

7. Under the treaty of 1783 (8 Sts. 80), a British remainder-man who recovers in ejectment against one in possession under a purchase of the confiscated life estate is not bound by the state law to pay the tenant for improvements. *Carver v. Astor*, 4 Pet. 1.

**Liability of Sureties on Bond for, given under Invalid Law.**

See BOND, 22.

**MEXICAN GRANTS — Public Lands — Lands in California — In general.**

See LANDS OF UNITED STATES — CONFLICTING CLAIMS; LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS.

**MEXICO — Treaties — In general.**

See TREATY.

**MILITARY COMMISSION — Power to try Civilians.]** Where the courts are open and in the proper and unobstructed exercise of their functions, a person in civil life and unconnected with the military service cannot be tried for a criminal offence by a military commission, although the privilege of the writ of *habeas corpus* be suspended. *Ex parte Milligan*, 4 Wal. 2.

2. Not even under authority of congress, for congress has no power to authorize such a trial in such a case. [CHASE, C. J., and WAYNE, and MILLER, JJ., dissenting.] *Ib.*

**MILITARY POWER — In general.**

See UNITED STATES; WAR.

Power to suppress Rebellion.

See REBELLION, 6.

**MILITIA — Power of President to call out — Proceedings in Case of Disobedience of his Order — Construction of the Act of 1795 and the Acts of 1863 and 1864.]** The act of February 28, 1795 (1 Sts. 424), which confers on the president power to call out the militia in certain cases, is constitutional. *Martin v. Mott*, 12 Wheat. 19.

2. Under that act the president is the exclusive judge whether an exigency for the exercise of the authority thereby conferred has arisen. *Ib.*

3. Disobedience of an order of the president thereunder calling out the militia renders a citizen liable to trial by court-martial. *Ib.*

4. A court-martial formed for the purpose of such a trial need not be formed according to the rules and articles of war as enacted by the act of April 10, 1806 (2 Sts. 367), but under the act of 1795, according to the general usage of the military service. *Ib.*

5. Nor does a court-martial, regularly called under that act, necessarily expire with the return of peace, there being no such limitation in the act. *Ib.*

6. A requisition is an order within the meaning of that act. *Ib.*

7. The Pennsylvania statute of March 28, 1814, providing that militiamen of that state refusing to serve, when called into actual service by order of the president, should be liable to the penalty prescribed by the act of 1795, or prescribed or to be prescribed by any subsequent act, and should be triable by state court-martial, held not repugnant to the constitution. [STORY, J., dissenting.] *Houston v. Moore*, 5 Wheat. 1.

8. Section 25 of the act of March 3, 1863 (12 Sts. 731), for enrolling and calling out the national forces, construed with section 12 of the amendatory act of February 24, 1864 (13 Sts. 8), is limited to prevention of resistance to a draft; and the latter section is limited to prevention of resistance to the enrolment. *United States v. Scott*, 3 Wal. 642; *United States v. Murphy*, *Id.* 649.

9. The notifying of enrolled and drafted men to report for duty is not service relative to enrolment, within the meaning of the latter act; and hence resistance of a person serving such notice is not punishable thereunder. *United States v. Scott*, 3 Wal. 642.

10. Nor can service relative to the enrolment be deemed a service relative to the draft; and so resistance of a person engaged in the former service is not punishable under the former act. *United States v. Murphy*, 3 Wal. 649.

*Justice of Peace of District of Columbia, Officer of United States and not liable to Militia Duty under Act of 1792.*

See COURTS-MARTIAL, 6.

**MILLS AND DAMS — Right to flood Lands.]**

Whether statutes known as general mill acts, permitting any owner of land on a stream not navigable to erect dams for mills and to flood lands, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, not decided. *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9.

2. Such a statute, however, — the New Hampshire statute, for instance, — in providing by judicial proceeding for the ascertainment and payment of damages to the owners of lands flooded, and in regulating the manner in which the rights of proprietors may be asserted and enjoyed, with a due regard to the interests of all and to the public good, is not unconstitutional as depriving them of their property without due process of law. *Ib.*

**MINES — Location of Claim — Notice.**

See pl. 1-5.

*Improvements, etc., to be made by Locator — When to be made — Adjoining Claims held in Common.*

See pl. 6-11.

*Conflicting Claims — Practice in Proceedings to determine.*

See pl. 12-14.

*Conflicting Claims — Evidence of Extent or Priority of Possession — Water Rights — Applicability of the Common Law — First in Time, first in Right.*

See pl. 15-22.

*Conflicting Claims — Construction of Compromise Agreements between Contiguous owners.*

See pl. 23.

1. — *Location of Claim — Notice.*] The act of July 9, 1870 (16 Sts. 217), limiting the location of a placer claim to one hundred and sixty acres for one person or association of persons, and the act of May 10, 1872 (17 Sts. 91), limiting such location to twenty acres for one person, do not preclude the issue of a single patent for more than one hundred and sixty acres on one application for contiguous locations taken up by different persons, and subsequently purchased and held by one. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636; *Tucker v. Masser*, 113 U. S. 203.

2. Under the act of July 26, 1866 (14 Sts. 251), and the act of 1872, the location of a mining claim on a lode or vein of ore, to enable the locator to follow the dip of the lode, although beyond the side lines of the location, should be made along the same lengthwise of the course of its apex at or near the surface. If laid otherwise, *e. g.*, crosswise, it will secure so much only of the lode as it actually covers, as in that case the side lines, for the purpose of defining the rights of owners, will be treated as end lines, which are deemed to extend downwards perpendicularly.

**MINES — continued.**

*Flagstaff Silver Mining Co. v. Tarbet*, 98 U. S. 463.

3. A location of more than the two hundred lineal feet allowed by law does not render the whole claim void. The excess may be rejected and the claim held good for the rest. *Richmond Mining Co. v. Rose*, 114 U. S. 576.

4. One who, after having posted a notice of the location of a mining claim, is prevented by force or threats from sinking the shaft necessary to the perfecting of his location, loses no rights, nor can his tortious dispossessor acquire any. *Erhardt v. Boaro*, 113 U. S. 527.

5. A notice in form thus, "We, the undersigned, claim 1,500 feet on this mineral-bearing lode, vein, and deposit," is a sufficient notice of a claim to seven hundred and fifty feet on each side of the stake on which the notice is posted. *Ib.*

6. — *Improvements, etc., to be made by Locator — When to be made — Adjoining Claims held in Common.*] Under the act of 1872, requiring work to be done each year by the locator of a mining claim, and the amendatory act of June 6, 1874 (18 Sts. 61), extending the time for doing work to January 1, 1875, a claim would then be open to relocation if work were not previously done, or done before a relocation were in fact made, the doing of work before a relocation by another restoring the right of the original locator. Accordingly, where work was done at any time in 1875, no relocation by another having been made before, there could be no forfeiture until the end of the year 1876, and a relocation by another in December, 1876, could give no rights against the original locator, nor, although his rights lapsed January 1, 1877, could such relocation be made available after that date; and the original locator, therefore, by an entry and a relocation in February, 1877, and by doing the necessary work, was restored to his original status. *Belk v. Meagher*, 104 U. S. 279.

7. And the entry of December, 1876, not being accompanied by actual possession, could not be relied on as the beginning of an adverse possession on which rights could be predicated. *Ib.*

8. Labor and improvements, within the meaning of the act of 1872, are deemed to have been put on a mining claim, whether it consists of one or more locations, when the labor was performed or the improvements were made for its development, although in fact such labor and improvements may be on ground which originally constituted only one of the locations, or may be at a distance from the claim. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636.

9. Where several adjoining claims to mineral lands are held in common, work for the benefit of all done on any one of them in a given year, to an amount equal to that required to be done by all in that year, meets the requirement of § 2324, Rev. Sts., and prevents a relocation. *Chambers v. Harrington*, 111 U. S. 350.

**MINES — continued.**

10. The expenditure necessary to protect mining claims against adverse location, which section 2324 declares may suffice as to claims held in common, if made on any one of them, must be made for the benefit of all, not for the benefit of one to the neglect or at the expense of the others. *Jackson v. Roby*, 109 U. S. 440.

11. Where, in a suit under section 2326, to settle opposing claims to mineral lands, the claims both depend on compliance with the law requiring expenditure thereon, and neither party shows compliance, the finding may be against both. *Ib.*

12. — *Conflicting Claims — Practice in Proceedings to determine.*] The filing of the complaint is a commencement of proceedings, under Rev. Sts. § 2326, to determine conflicting rights in mineral lands. *Richmond Mining Co. v. Rose*, 114 U. S. 576.

13. Where, in such proceedings, the defendant demurs, answers, and goes to trial without objecting that the complaint was filed too late, he is precluded from raising the objection. *Ib.*

14. Pending such proceedings in court, the officers of the land department have no right to assume from the fact of delay a waiver of the proceedings, and to issue a patent regardless of the adverse claim. *Ib.*

15. — *Evidence of Extent or Priority of Possession — Water Rights — Applicability of the Common Law — First in Time, first in Right.*] The local record of a mining community is not the best or only evidence of priority or extent of actual possession of a mining claim. *Campbell v. Rankin*, 99 U. S. 261.

16. On the question of the right to possession to a mining claim, neither party having a legal title to the *locus in quo*, the plaintiff may show prior occupancy, especially when accompanied by a deed showing color of right. *Ib.*

17. The common law as to the rights of riparian proprietors to the use of running waters is inapplicable, or applicable to a very limited extent only, to miners on public mineral lands in the Pacific states and territories. Prior appropriation there gives the better right to running waters to the extent in quantity and quality necessary for the purposes to which they are applied. *Atchison v. Peterson*, 20 Wal. 507.

18. What diminution of quantity or impairment of quality will constitute an invasion of the rights of an appropriator depends on circumstances; and in controversies between him and subsequent claimants the question is whether the use and enjoyment of the water to the extent of the original appropriation have been impaired. *Ib.*

19. Under the act of July 26, 1866 (14 Sts. 251), which provides that where by priority of possession rights to the use of water for mining purposes, etc., have vested and are recognized by "local customs, laws, and decisions of courts," the possessors, etc., shall be protected therein, the customary law among occupants of public lands is deemed valid, and may be shown by evi-

**MINES — continued.**

dence of custom, by legislation, or by the decisions of the courts; and in case of conflict between custom and statute the latter will prevail. *Basey v. Gallagher*, 20 Wal. 670.

20. By the customary law of miners in California, the owner of a mining claim and the owner of a water-right hold their respective properties from the dates of appropriation, the first in time being the first in right, the enjoyment of both being allowed where they may be enjoyed without interference with each other. *Jennison v. Kirk*, 98 U. S. 453.

21. And by that law one may not construct a ditch to convey water across the mining claim of another, taken up and worked according to that law before the right of way was acquired by the ditch owner, so as to prevent the further working of the claim as such claims are worked, as, for instance, by the method known as the hydraulic process; nor so as to cut off the water previously appropriated by the miner for that or another beneficial purpose. *Ib.*

22. Whether equity will enjoin an interference with the rights of the first appropriator of running water on public mineral lands in the Pacific states and territories depends on considerations which ordinarily govern courts of equity in the exercise of such jurisdiction. *Atchison v. Peterson*, 20 Wal. 507.

23. — *Construction of Compromise Agreements between Contiguous Owners.*] An agreement to compromise disputes between contiguous mining companies as to rights to mine, etc., may be construed according to the subject-matter, and to give the right to one company to follow the dip, although under the surface it may extend under the land which on the surface it has been agreed shall be deemed that of the other company. *Richmond Mining Co. v. Eureka Mining Co.*, 103 U. S. 839.

**Claim — Meaning of the Term.**

See *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636.

**Claim taxable as Property.**

See **TAX — POWER**, 52.

**Lien on Mines.**

See **LIEN**, 12.

**Mexican and Spanish Grants.**

See **LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS**, 27 *et seq.*

**Partnership in Mines — Right of Member — Dissolution.**

See **PARTNERSHIP**, 35, 36, 78.

**MISDEMEANOR — Advising, etc., Robbery of the Mails.**

See **POST-OFFICE**, 19.

**In general.**

See **CRIMES**.

**Offence under Slave-trade Act.**

See **SLAVE TRADE**, 15.



**MISJOINDER** — *Actions — In general.*See ACTION, 1 *et seq.**Counts — In general.*

See PLEADING.

*Parties — In general.*

See PARTIES.

**MISPRISION** — *Treason — What constitutes.*

See TREASON.

**MISREPRESENTATION** — *Action therefor, in general.*

See DECEIT.

*Contract — Affecting, in general.*

See CONTRACT.

*Contract of Insurance — Misrepresentation affecting.*

See INSURANCE.

*In general.*

See FRAUD — IN GENERAL.

**MISSIONS** — *Lands in Oregon occupied as Missionary Stations — Title.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 114.

*Lands of Missions in California — Mexican Grants.*

See LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS.

**MISSISSIPPI RIVER** — *Navigation — In general.*

See COLLISION.

*Right of Riparian Proprietor to erect Pier to hold Boom for Logs.*

See WATERS, 29, 31.

**MISSOURI** — *Boundary between, and Iowa.*

See STATES — BOUNDARIES, 3.

*Boundary on the East — Middle of the Stream.*

See STATES — BOUNDARIES, 6; WATERS, 15.

*Lands of the State — In general — School Lands.*

See LANDS OF STATES — MISSOURI.

**MISTAKE** — *Contract — In general.*

See CONTRACT.

*Law, Mistake of — What is — As to Validity of Judicial Sale.*

See RAILROAD — MORTGAGE, 39.

*Money paid by Mistake — Recovery — Law or Fact.*See DUTIES — REMEDIES FOR ILLEGAL EXACTION, 4 *et seq.**Money paid by — Recovery.*See ASSUMPSIT, 24 *et seq.**Relief in Equity — When — Law — Fact.*See EQUITY — JURISDICTION, 90 *et seq.***MISTAKE** — *continued.**Sealed Instrument — Alteration by Court of Law.*

See CONTRACT — CONSTRUCTION, 9.

*Writ of Error — Mistake in Date — No Effect, when.*

See ERROR — BRINGING AND PERFECTING, 35.

**MITTIMUS** — *When necessary.*

See CRIMINAL PROCEDURE, 5.

**MOBILE** — *Lands — Grants from United States.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 115.

**MODIFICATION** — *Contracts — In general.*

See CONTRACT — MODIFICATION AND MERGER.

*Injunction — In general.*

See INJUNCTION.

**MONEY** — *What constitutes.* [An agreement to pay the bearer fifty cents in goods on demand is not within § 2, act of July 17, 1869 (12 Sts. 592), which forbids the making, etc., of notes, etc., for a sum less than a dollar, "intended to circulate as money, or to be received or used in lieu of lawful money of the United States," although intended so to circulate and to be so received and used. [MILLER, J., dissenting.] *United States v. Van Auken*, 96 U. S. 366.]

*Assets in the Hands of Executor or Administrator — What is.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 67, 68.

*Borrowing — Power of Municipal Corporation to borrow.*See MUNICIPAL CORPORATION — FISCAL POWERS, 1 *et seq.*, 61-64.*Confederate — In general.*

See CONFEDERATE MONEY.

*Contracts — In what money solvable.*See CONTRACT — CONSTRUCTION, 23 *et seq.**Execution — May be taken in.*

See EXECUTION, 11.

*Foreign Money — Value at the Custom-house in Payment of Duties.*

See DUTIES — ASSESSMENT, 43, 44.

*Had and received — Action therefor.*

See ASSUMPSIT, 13-19.

*Issuing — Power of Municipal Corporations to issue Bills.*

See MUNICIPAL CORPORATION — FISCAL POWERS, 8-10.

*Lent — Action therefor.*

See ASSUMPSIT, 19, 23.

*Made on Execution not Property of Execution Creditor while in Hands of Officer, and not Subject to his Creditors.*

See EXECUTION, 12.

**MONEY** — *continued.*

*Paid to Collector of Customs under Mistake of Law or Fact — Recovery.*

See DUTIES — REMEDIES FOR ILLEGAL EXACTION, 4 *et seq.*

*Paid — Action therefor.*

See ASSUMPSIT, 20-22.

*Payment — In what Money Agent may accept Payment of Debt due Principal.*

See AGENCY, 19.

*Tender — In what Money made — Power of Government to borrow.*

See TENDER.

**MONTH** — *Meaning of the Word.*] If the parties to a contract use the word "month," without defining it, it is to be construed, in the absence of a statutory provision, to mean a calendar, not a lunar, month. *Sheets v. Selden*, 2 Wal. 177.

**MONUMENTS** — *Boundary — Matter of.*

See BOUNDARY, 4.

*Construction of Entries of Public Lands.*

See LANDS.

*Control Courses and Distances, when.*

See DEEDS — CONSTRUCTION, 3 *et seq.*

**MOOT CASE** — *Supreme Court will affirm on Appeal or Error without considering.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 471, 472.

*Supreme Court will not hear.*

See SUPREME COURT — PRACTICE, 22 *et seq.*

**MORMONISM** — *Constitutional Provision respecting Religious Establishment.*

See CONSTITUTION, 8.

*Polygamous Marriage — When punishable under Rev. Sts. § 5352.*

See BIGAMY, 2.

**MORTGAGE** — *Assignment — In general.*

See MORTGAGE — ASSIGNMENT.

*Chattels — Mortgage in general.*

See CHATTEL MORTGAGE.

*Foreclosure — In general.*

See MORTGAGE — FORECLOSURE.

*Form and Requisites of Mortgage — In general.*

See MORTGAGE — FORM AND REQUISITES.

*General Matters.*

See MORTGAGE — IN GENERAL.

*Grantee of Equity of Redemption.*

See MORTGAGE — GRANTEE OF EQUITY.

*Merger — In general.*

See MORTGAGE — MERGER.

*Mortgagee — In general.*

See MORTGAGE — MORTGAGEE.

**MORTGAGE** — *continued.*

*Mortgagor — In general.*

See MORTGAGE — MORTGAGOR.

*Payment — In general.*

See MORTGAGE — PAYMENT.

*Power of Sale in Mortgages — In general.*

See MORTGAGE — POWER OF SALE.

*Priorities — In general.*

See MORTGAGE — PRIORITY.

*Railroads — Mortgages thereof — In general.*

See RAILROAD — MORTGAGE.

*Redemption — In general.*

See MORTGAGE — REDEMPTION.

*Subrogation — In general.*

See MORTGAGE — SUBROGATION.

*Validity of Mortgages — In general.*

See MORTGAGE — VALIDITY.

**MORTGAGE — ASSIGNMENT** — *Assignee unaffected by Subsequent Equities, etc.*] Where a negotiable note and a mortgage given to secure its payment are assigned before maturity to one who takes in good faith and for value, he is unaffected by equities subsequently arising between mortgagor and mortgagee, on a collateral agreement of which he has no notice, and may enforce the mortgage for the full amount of the note. *Carpenter v. Longan*, 16 Wal. 271.

2. The lawful holder for value of a note purchased before maturity is entitled to avail himself of a lien given on land by a trust deed to secure its payment, notwithstanding a release of record of "all the right, title, interest, claim, and demand" of the trustee, who has acquired the title by conveyances subsequent to the trust deed, the release not acknowledging payment of the note, and the land having been conveyed by the trustee subsequent to the execution of the release by deed of trust to secure his own indebtedness. *Swift v. Smith*, 102 U. S. 442.

3. Where, by mistake, a covenant is inserted in a deed of mortgaged land, binding the grantee to assume and pay the mortgage, and on discovery thereof the grantor executes a deed of release of the covenant, a third party, who buys the mortgage notes after the conveyance and before the release, in ignorance of the supposed agreement, and doing nothing on the faith of it, cannot charge the grantee with the payment thereof, although he has paid interest thereon. *Drury v. Hayden*, 111 U. S. 223.

*Effect of Assignment of Debt secured by.*

See ASSIGNMENT, 10.

**MORTGAGE — FORECLOSURE** — *In general — Preliminary Proceedings, Demand, etc. — Remedy by Proceedings on the Mortgage Debt.*

See pl. 1-7.

*Pleading — What the Bill should allege — What Relief it should ask.*

See pl. 8-10.

**MORTGAGE — FORECLOSURE — continued.**

*Parties — Who necessary — Who Real Parties in Interest.*

See pl. 11-19.

*Decree — What covered — Who affected — Form and Effect in general — Decree for Deficiency — For Costs — Finality — Setting aside Decree.*

See pl. 20-39.

*Sale under Decree — Order of Sale, how issued — Adjournment — Sale, how made and what necessary to Validity — Caveat Emptor — Setting aside Sale.*

See pl. 40-51.

*Effect of Foreclosure Proceedings taken during the Rebellion in the Absence of the Mortgagor.*

See pl. 52, 53.

1. — *In general — Preliminary Proceedings, Demand, etc. — Remedy by Proceedings on the Mortgage Debt.*] Where mortgage bonds of a corporation are payable at a particular place, demand of payment need not be made there before suit is brought to foreclose the mortgage, if the corporation is insolvent and has no funds there. *Shaw v. Bill*, 95 U. S. 10.

2. Objection to a bill to foreclose a mortgage on property *in custodia legis* by possession of a receiver, for that it was filed without leave, is not available where the bill was brought in the same court by which the receiver was appointed, where a year and a half has elapsed since the filing of the bill, where the objecting party has appeared, answered, and cross-examined the complainant's witnesses without objecting, and where orders have been made to facilitate the progress of the suit. The defendant must be deemed to have acquiesced, and leave must be presumed. *Jerome v. McCarter*, 94 U. S. 734.

3. A mortgage payable by instalments, which provides that on default as to any one of them the entire debt may be deemed due and collectible, may be foreclosed for the entire sum in case of such default, notice being given by the mortgagee of an election to consider the whole due before the filing of the bill. *Noonan v. Lee*, 2 Black, 499.

4. Where a first mortgagee is made a party to a bill brought by a second mortgagee to foreclose the second mortgage, and is duly notified, he cannot complain of the acts of a receiver appointed therein, done before he sees fit to appear, or done afterwards without objection, the appointment and the acts complained of being justified by the exigencies of the case, and being necessary for the preservation and benefit of the property. *Miltenberger v. Logansport, Crawfordsville, & Southwestern Railway Co.*, 106 U. S. 286.

5. The holder of a note secured by mortgage may proceed at law and in equity at the same time, until he obtains actual satisfaction of the debt. *Ober v. Gallagher*, 93 U. S. 199.

**MORTGAGE — FORECLOSURE — continued.**

6. *Semble* that a mortgagee cannot levy on the property mortgaged an execution issued on a judgment rendered in a suit on the mortgage debt. *Pugh v. Fairmount Gold & Silver Mining Co.*, 112 U. S. 238.

7. However this may be, a sale under an execution issued on a judgment recovered in a suit on part of the notes secured by a mortgage, does not affect the right of the holders of other of the notes to foreclose the mortgage. *Ib.*

8. — *Pleading — What the Bill should allege — What Relief it should ask.*] A deed cannot be foreclosed as an equitable mortgage on a bill which sets out the instrument as a valid legal mortgage; there must be a new bill setting out the complainant's equity. *Koehler v. Black River Falls Iron Co.*, 2 Black, 715.

9. In a suit to foreclose a mortgage, it need not be alleged in the bill that the failure to pay was not the result of a contingency, the occurrence of which it was agreed should excuse a default. This is matter of defence. *Little Rock Waterworks Co. v. Barret*, 103 U. S. 516.

10. In a foreclosure suit by a second mortgagee, where the lien of the first mortgage is admitted, and the first mortgagee is made a party to the suit, and a receiver is prayed for, the bill is not necessarily defective in not asking direct relief against the first mortgagee. *Miltenberger v. Logansport, Crawfordsville, & Southwestern Railway Co.*, 106 U. S. 286.

11. — *Parties — Who necessary — Who Real Parties in Interest.*] To proceedings to foreclose a mortgage, a subsequent lien creditor is not a necessary party; and, although joined, he need not join in the appeal where he has not appeared; *a fortiori*, where the only matter in controversy is the amount of the plaintiff's debt, which he does not contest. *Brewster v. Wakefield*, 22 How. 118.

12. A junior incumbrancer is not a necessary party to proceedings to enforce the lien of the senior incumbrance. *Howard v. Milwaukee & St. Paul Railway Co.*, 101 U. S. 837.

13. The holders of bonds secured by a trust deed are not necessary parties to proceedings to foreclose, the trustees being their representatives and acting for them. *Vose v. Bronson*, 6 Wal. 452.

14. Where the mortgaged premises have been conveyed in trust, subject to the mortgage, for the benefit of children born and to be born, all children *in esse* should be made parties to a bill to foreclose; and any not joined will not be concluded. *Clark v. Reyburn*, 8 Wal. 318.

15. The assignee of a bond and mortgage, who holds it as collateral security, is, if not the real party in interest for the purpose of a suit thereon, a "trustee of an express trust," within the meaning of the New York code, and may sue without joining his assignor; and hence, if in such suit the defendant recoup, and judgment go accordingly for less than the face of the mortgage,

**MORTGAGE — FORECLOSURE — continued.**

the assignor is concluded, and cannot maintain a suit for the sum deducted. *Chew v. Brumagen*, 13 Wal. 497.

16. Where a joint tenant assumes to mortgage the whole estate instead of his share merely, — the record showing his title, — the other joint tenants are neither necessary nor proper parties defendant to a suit to foreclose, no relief being claimed against them. *Stephen v. Beall*, 22 Wal. 329.

17. Prior mortgagees are not necessary parties to a bill by a junior mortgagee, seeking only the foreclosure or the sale of the equity of redemption. *Jerome v. McCarter*, 94 U. S. 734.

18. One who claims adversely to both mortgagor and mortgagee is not a proper party defendant in proceedings to foreclose. *Dial v. Reynolds*, 96 U. S. 340.

19. Where a mortgage of land in Louisiana contains the *pact de non alienando*, and the mortgagor's interest is afterwards confiscated under the act of July 17, 1862 (12 Sts. 589), in a subsequent proceeding by the mortgagee to enforce the mortgage, the mortgagor is the only necessary party defendant, as in other cases of alienation. *Avegno v. Schmidt*, 113 U. S. 293.

20. — *Decree — What covered — Who affected — Form and Effect in general — Decree for Deficiency — For Costs — Finality — Setting aside Decree.* In the absence of a rule of the supreme court providing otherwise, the federal courts will make no decree on a bill to foreclose for payment of such part of the mortgage debt as may remain unpaid after application of the proceeds of the sale of the mortgaged property. *Noonan v. Lee*, 2 Black, 499. [See, however, rule of April 18, 1864.]

21. This is true of a territorial court as well as of courts organized under the judiciary act. [NELSON, SWAYNE, and FIELD, JJ., dissenting.] *Orchard v. Hughes*, 1 Wal. 73.

22. Foreclosure and sale under a junior mortgage does not affect a prior mortgagee who is not a party thereto. *Finley v. United States Bank*, 11 Wheat. 304. And see *Rankin v. Scott*, 12 Wheat. 177.

23. A decree of sale in a suit to foreclose a mortgage in which known *cestuis que trust* are not joined, the only defendant being the trustee, who made the mortgage on account of the known *cestuis que trust*, does not bind the title of the latter. *Oliver v. Piatt*, 3 How. 333.

24. An action which, in effect, is the ordinary hypothecary action of the law of Louisiana, — an action, *i. e.*, where payment of a special mortgage is to be enforced, — is not a proceeding *in rem*, although called a real action, and the judgment rendered will not bind a prior mortgagee not made a party thereto. *Dupassey v. Rochereau*, 21 Wal. 130.

25. The party in possession of land under a conveyance from the mortgagor's grantee, made pending a foreclosure suit to which the mort-

**MORTGAGE — FORECLOSURE — continued.**

gagor's grantee (then in possession) was not made a party, cannot be put out of possession by the purchaser at the foreclosure sale. The decree does not bind him, as it does not his grantor. *Terrell v. Allison*, 21 Wal. 289.

26. Although an elder mortgagee should be joined in a suit brought to foreclose a junior mortgage and to enforce a sale of the mortgaged premises, yet if he be not joined, and a decree for foreclosure and sale be made and executed with the consent of the mortgagor before the existence of a prior mortgage becomes known to the court, it is not erroneous to refuse, on the petition of the mortgagor, to vacate the decree and let in the prior mortgagee, such mortgagee's rights being unaffected by such sale. *Finley v. United States Bank*, 11 Wheat. 304.

27. Neither the mortgagee nor his assignee in bankruptcy can object to the order in which the priority of valid and subsisting liens on the mortgaged premises is fixed by a decree of foreclosure. *Jerome v. McCarter*, 94 U. S. 734.

28. Where, in a suit in equity to foreclose a mortgage, it appears that the plaintiff's possession of the notes secured by the mortgage is tortious, the suit should be dismissed. *Weaver v. Field*, 114 U. S. 244.

29. Purchasers with notice of the mortgage are not entitled to a deduction of the value of any improvements they may have made on the mortgaged premises from the proceeds of a sale on a bill to foreclose. *Hughes v. Edwards*, 9 Wheat. 489.

30. Nor to an apportionment of the debt among all the several parcels, the mortgagee having a right to have a sale of all for payment of the debt. *Ib.*

31. Where a decree of foreclosure and sale for default in payment of a sum due contains a clause authorizing the complainant, on petition, to have an order of sale on default as to any future instalment, successive orders on such summary proceedings are regular and sufficient. *Fleming v. Soutter*, 6 Wal. 747.

32. A decree of strict foreclosure which does not find the sum due, nor allow time for redemption, but is final and conclusive in the first instance, cannot be sustained, in the absence of special authority of law. *Clark v. Reyburn*, 8 Wal. 318.

33. Where, after the commencement of a suit brought to determine the amount of the lien of a mortgagee, payments are made to him on the mortgage, they must be considered in computing the amount for which judgment should be rendered. *Wood v. Weimar*, 104 U. S. 786.

34. Where a decree foreclosing a mortgage is defective in omitting to provide for redemption, and, because of such defect, the defendant appeals, his right to have the decision reviewed and reversed by the supreme court is not affected by his omission, during the period fixed by statute for exercising the right of redemption, to tender

**MORTGAGE — FORECLOSURE — continued.**

the necessary amount. *Mason v. Northwestern Insurance Co.*, 106 U. S. 163.

35. A statute which, like § 808, Rev. Sts., relating to the District of Columbia, provides that the decree in a foreclosure suit, besides subjecting the mortgaged property to the satisfaction of the demand, shall adjudge that the plaintiff recover his demand against the defendant, and have execution therefor, authorizes a decree *in personam* for the deficiency. *Dodge v. Freedman's Savings & Trust Co.*, 106 U. S. 445.

36. Where the mortgage provided for payment of the foreclosure expenses of the mortgagee, the court allowed the trustee counsel fees in addition to the taxed costs. *Bronson v. La Crosse & Milwaukee Railroad Co.*, 2 Wal. 233.

37. The non-revival of a suit for foreclosure, on the death of the defendant after decree of foreclosure and sale, and before confirmation of the sale thereunder, is not error, such a decree being final on the merits. *Whiting v. United States Bank*, 13 Pet. 6.

38. Unless the rights of third persons have intervened, a corporation may bring a suit to set aside for fraud a decree of foreclosure rendered against it, although not ignorant, during the pendency of the foreclosure suit, of the facts relied on to impeach the decree, such as that its directors and counsel did not represent its interest, but their own, the corporation being then powerless, because misrepresented, to resist the action of its directors; and the time during which an appeal from the decree thus rendered was pending should not be counted in considering the question of laches in instituting the proceeding to impeach the decree. *Missouri Pacific Railroad Co. v. Missouri Pacific Railway Co.*, 111 U. S. 505.

39. Where one seeks to foreclose a mortgage on land sold free from incumbrances under a decree in proceedings in bankruptcy, to which he was not a party, he cannot impeach the decree so far as it is against himself, and at the same time uphold it for the extinguishment of adverse liens. If he is permitted to foreclose, his mortgage should have its original position as to priorities, and the purchaser should be reimbursed his outlay for taxes and necessary repairs, and should account for rents and profits. *Factors' & Traders' Insurance Co. v. Murphy*, 111 U. S. 738.

40. — *Sale under Decree — Order of Sale, how issued — Adjournment — Sale, how made and what necessary to Validity — Caveat Emptor — Setting aside Sale.* Under the Indiana code the order of sale in foreclosure proceedings is to all intents an execution, and as such must issue under seal of the court, otherwise it will be void. *Etina Insurance Co. v. Hallock*, 6 Wal. 556.

41. And without such an order the sheriff has no power to sell, and the sale will give no title. *Ib.*

42. An officer who makes a sale under a decree of foreclosure has power, for cause, in the exercise of a sound discretion and under control

**MORTGAGE — FORECLOSURE — continued.**

of the court, to adjourn the sale from time to time. *Blossom v. Milwaukee & Chicago Railroad Co.*, 3 Wal. 196.

43. When the decree is that sale shall be made unless the mortgagors previously pay the debt, short adjournments made to enable the mortgagors to arrange to pay are for good cause. *Ib.*

44. Where a mortgagor of land and buildings adds machinery and water-power, so that all together constitute a paper-mill, all should be sold together as a unit in case of foreclosure, such course being obviously best for all concerned. *Hill v. Farmers' & Mechanics' National Bank*, 97 U. S. 450.

45. A holder of mortgage bonds whose rights are fully protected by the decree, *e. g.*, by order for payment of bonds with interest, cannot be heard to object to the confirmation of the sale on foreclosure. *Crawshaw v. Souther*, 6 Wal. 739.

46. In Louisiana, elsewhere than in the two parishes excepted by the statute, an actual seizure of the land is necessary to the validity of a sale under a foreclosure of a mortgage. *Watson v. Bondurant*, 21 Wal. 123.

47. Where a decree foreclosing a mortgage and directing a sale of the property orders to be paid a sum larger than is due as a condition precedent to the right to redeem, the error is vital and the sale invalid; as, for instance, where, interest being in arrear, the decree orders a sale unless principal and interest shall be paid within twenty days. And the case is not altered by the fact that the mortgage contains a provision that in the event of a sale for a default in payment of interest the property shall be sold as an entirety free from the incumbrance of the mortgage, and the proceeds applied to the payment of principal as well as of interest. *Chicago, Danville, & Vincennes Railroad Co. v. Fosdick*, 106 U. S. 47.

48. An irregular judicial sale at suit of the mortgagee of the property passes all rights of the mortgagee as such to the purchaser, even although no bar to the equity of redemption. *Brobst v. Brock*, 10 Wal. 519.

49. As the rule of *caveat emptor* applies to a purchaser at a foreclosure sale, he cannot retain from his bid a sum sufficient to pay taxes which were a subsisting lien on the property at the date of the decree. *Osterberg v. Union Trust Co.*, 93 U. S. 424.

50. In Louisiana, while the *pact de non alienando* makes it unnecessary for the mortgagee, in foreclosing the mortgage, to make a purchaser from the mortgagor a party to the proceeding, yet such purchaser may have the sale annulled if the forms of law have not been followed in making it, as, *e. g.*, if there has not been an actual seizure of the land, the law requiring it. *Watson v. Bondurant*, 21 Wal. 123.

51. If a mortgagor would impeach the title, on its face absolute, acquired by a purchaser at a sale on foreclosure on the ground that a parol agreement with the mortgagee and the purchaser en-

**MORTGAGE — FORECLOSURE — continued.**

titled him to a reconveyance, he must prove his case by satisfactory and convincing evidence, — evidence, *e. g.*, such as would justify the reformation of a written instrument on the ground of mistake. *Howland v. Blake*, 97 U. S. 624.

**52.** — *Effect of Foreclosure Proceedings taken during the Rebellion in the Absence of the Mortgagor.* Foreclosure proceedings taken during the war and while the mortgagor was in the confederacy and forbidden to enter the Union lines, did not extinguish the equity of redemption. *Dean v. Nelson*, 10 Wal. 158; *Lasere v. Rochereau*, 17 Wal. 437.

**53.** But where a resident of a confederate state voluntarily went within the confederate lines on occupation by the federal forces of the place where he resided, and there remained notwithstanding a proclamation of amnesty, he cannot assert that, in proceedings against him in the local court, taken in his absence under a statute providing a remedy against absconding debtors, the court acquired no jurisdiction. *Ludlow v. Ramsey*, 11 Wal. 581.

*Agreement by Holders of Notes to convert Notes into Stock — When a Bar to Foreclosure Proceedings.*

See CONTRACT — WHAT CONSTITUTES, 10.

*Alien Mortgagee may foreclose.*

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*Appeal from Order respecting Confirmation of Sale.*

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*Bankruptcy — Effect on Pending Foreclosure Suit.*

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*Decisions respecting the Order in which Different Parcels of Mortgaged Property shall be subjected to Satisfaction, followed by Federal Courts.*

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*Decree — Conclusiveness.*

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*Decree — Judgment Lien discharged.*

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*Decree — What is, in Louisiana.*

See APPEAL AND ERROR — JURISDICTION, 168.

*Decree — When Final for Purposes of Appeal.*

See APPEAL AND ERROR — JURISDICTION, 161 *et seq.*

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**MORTGAGE — FORECLOSURE — continued.**

*Decree — Whether Person not joined is Mortgagee.*

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**MORTGAGE — FORM AND REQUISITES — In**

*general — What constitutes a Mortgage —*

*"Once a Mortgage, always a Mortgage" — Equitable Mortgages.*

See pl. 1-6.

*Deeds apparently absolute, when deemed Mortgages — Defeasible Character, how shown — Construction.*

See pl. 7-20.

**1.** — *In general — What constitutes a Mortgage — "Once a Mortgage, always a Mortgage" — Equitable Mortgages.* Although no precise form of words is necessary to constitute a mortgage, there must appear a present purpose of the mortgagor to pledge his land for the payment of a sum of money or for the performance of some act. *New Orleans National Banking Association v. Adams*, 109 U. S. 211.

**2.** A deed of land, with a power of sale to secure the payment of a debt, is in equity a

**MORTGAGE — FORM AND REQUISITES — continued.**

mortgage, whether made to the creditor or to a third person, if there be left a right to redeem on payment of the debt. *Skilaber v. Robinson*, 97 U. S. 68.

3. In Connecticut, a mortgage, to be valid, must truly describe the debt intended to be secured. *Townsend v. Todd*, 91 U. S. 459.

4. A mortgage, in equity as well as at law, is more than a mere lien, — it is a transfer of the property itself as security for the debt, the mortgagee holding, on payment, in trust for the mortgagor. *Conard v. Atlantic Insurance Co.*, 1 Pet. 386.

5. The doctrine "once a mortgage, always a mortgage," applied to an instrument foreclosed as a mortgage, but afterwards in proceedings by the mortgagor to redeem alleged by the mortgagee to be a conditional sale. *Dean v. Nelson*, 10 Wal. 158.

6. Not only a deposit of title papers, but an intent thereby to give security is necessary to the constitution of an equitable mortgage. *Mandeville v. Welch*, 5 Wheat. 277.

7. — *Needs apparently absolute, when deemed Mortgages — Defeasible Character, how shown — Construction.*] A deed intended as security for the payment of money will be deemed a mortgage, in equity, although on its face absolute. *Hughes v. Edwards*, 9 Wheat. 499; *Morris v. Nixon*, 1 How. 118; *Babcock v. Wyman*, 19 How. 289; *Peugh v. Davis*, 96 U. S. 332.

8. Such a deed is a mortgage, even at law, if accompanied by a separate contemporaneous agreement in writing to reconvey on payment of the debt. *Teal v. Walker*, 111 U. S. 242.

9. A conveyance with an agreement to reconvey is not, necessarily, a mortgage. Whether it will be treated as a mortgage or not depends on the circumstances. *Horbach v. Hill*, 112 U. S. 144.

10. Where a plaintiff in equity would avail himself of the defeasible character of a deed in form absolute, he must plead it. *Grosholz v. Newman*, 21 Wal. 431.

11. Where the negotiation was at the outset for a loan on mortgage security, and the deed executed was on its face absolute and recited other consideration, and a bond was given for the sum loaned, it was held that, in the circumstances, the lender must prove that the original design was changed and an absolute sale agreed on, in order to support the transaction as a sale, notwithstanding the tenor of the deed. *Morris v. Nixon*, 1 How. 118.

12. The rule which excludes parol evidence to contradict or vary a written instrument does not prevent its admission to show that a deed absolute in form is really a mortgage. *Conway v. Alexander*, 7 Cranch, 218; *Russell v. Southard*, 12 How. 139; *Babcock v. Wyman*, 19 How. 289 [CATRON, J., dissenting]; *Peugh v. Davis*, 96 U. S. 332; *Brick v. Brick*, 98 U. S. 514.

**MORTGAGE — FORM AND REQUISITES — continued.**

13. The rule has reference to the language used. It does not forbid an inquiry in equity into the object of the parties. *Brick v. Brick*, 98 U. S. 514.

14. Where there is a question whether an instrument is a conditional sale or a mortgage, the courts incline to construe it to be a mortgage. *Conway v. Alexander*, 7 Cranch, 218; *Russell v. Southard*, 12 How. 139.

15. The true question in such case is whether the instrument was intended as an absolute conveyance or as security for a debt. *Conway v. Alexander*, 7 Cranch, 218.

16. The absence of a covenant to repay is not decisive of it; but the fact that the sum paid was out of proportion to the value of the land is of great weight. *Id.* And see *Russell v. Southard*, 12 How. 139.

17. Whether a negotiation of securities is a sale or a borrowing on security is *prima facie* a question of fact, and becomes a question of law only when some fact is shown which is irreconcilable with one or the other conclusion. *Junction Railroad Co. v. Ashland Bank*, 12 Wal. 226.

18. It is a question of fact, although the negotiation be of one's own bond or note (which is ordinarily a loan in law), where a sale is authorized by statute, as in the case of the bonds of railroads. *Id.*

19. The fact that collateral security is required or given in such case is not inconsistent with the idea of sale. *Id.*

20. The relation of debtor and creditor will exist, and the conveyance will be a mortgage, where the memorandum ascertains the sum advanced and the extrinsic evidence proves it to have been by way of loan, although no written personal security for the repayment of the money were taken. *Russell v. Southard*, 12 How. 139.

*Decisions of State Courts that under the Statute the Mortgage must truly describe the Debt, followed by the Federal Courts.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 56.

**MORTGAGE — GRANTEE OF EQUITY — Right of Grantee to set up Usury in the Loan — Release of Equity closely scrutinized — Assumption of Mortgage.**] The assignee of an equity of redemption cannot set up usury in the mortgage loan, in proceedings on a bill to foreclose. *De Wolf v. Johnson*, 10 Wheat. 367.

2. Although a mortgagee in possession may take a release from the mortgagor of his equity, the transaction will be carefully scrutinized, and if an unconscientious advantage appear to have been taken, the release will be set aside. *Russell v. Southard*, 12 How. 139.

3. A mortgagee who takes an absolute conveyance of the equity of redemption will still be deemed to be but a mortgagee, if the consider-

**MORTGAGE — GRANTEE OF EQUITY — continued.**

ation be not sufficient, or if the transaction be not clear of everything like unfairness or oppression, and especially where the relations of the parties are confidential; for instance, where the conveyance is from a widow and her children, the mortgagee is the widow's brother, the grantors are poor and ignorant, the consideration is insufficient, and the terms of the mortgage loan are very oppressive. *Villa v. Rodriguez*, 12 Wal. 323.

4. While a mortgagor may release the equity of redemption, if the transaction asserted as a release is denied by the mortgagor to have that effect, it will be closely scrutinized. A release is not to be inferred from equivocal circumstances and loose expressions, and it must be based on an adequate consideration. Where, therefore, the testimony of the parties is at variance as to essential particulars of the transaction, and the value of the equity was greatly in excess of the sum for which the alleged release was given, and the mortgagor retained possession, and the writings relied on by the mortgagee are inconclusive, a release is not to be inferred. *Peugh v. Davis*, 96 U. S. 332.

5. An agreement by the purchaser of land to take "subject to" a specified incumbrance does not import an agreement to assume and pay the incumbrance. *Elliott v. Sackett*, 108 U. S. 132.

6. A statute which, like the Illinois statute of July 1, 1875, declares valid mortgages on land in the state previously taken by foreign corporations to secure loans does not deprive of a vested right of property within the meaning of the fourteenth amendment one who purchased land subject to such a mortgage, agreeing with his vendor to pay the mortgage as part of the consideration, although, by the law in force when he purchased, such mortgages were invalid. In the absence of the statute the mortgagor, would be liable personally to the mortgagee, and would have a vendor's lien on the land for the amount of his liability. *Gross v. United States Mortgage Co.*, 108 U. S. 477.

**MORTGAGE — IN GENERAL — Bankruptcy Court will order Sale of Mortgaged Property, free from Mortgage, when.**

See BANKRUPTCY — JURISDICTION, 28.

**Bankruptcy — Effect of.**

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**Equity of Redemption not to be taken in Execution.**

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**Husband and Wife, as Bar of Dower — Right of Dower in Equity of Redemption.**

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See CONFLICT OF LAWS, 6, 25.

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**Parol Evidence to vary or explain.**

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**Property covered — Personality inherited by one, Realty by another.**

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**Rights by Way of Mortgage as affected by Treaty.**

See TREATY, 16 et seq.

**Surrender — Presumption, in Circumstances, from Surrender of Second Mortgage Bonds, of Intent to surrender Rights under First Mortgage Bonds.**

See PRESUMPTIONS, 8.

**MORTGAGE — MERGER — What operates.]**

Where a mortgagee becomes the owner of the equity of redemption, the mortgage will not be deemed merged if a merger is contrary to the apparent intent or the interest of the mortgagee. *Factors' & Traders' Insurance Co. v. Murphy*, 111 U. S. 738.

2. Where one signs his name on the back of a note for the accommodation of the maker, whether a joint maker, a guarantor, or an indorser, and takes a mortgage from the maker, as indemnity, and is compelled to pay, he may assign the note and mortgage, and his assignee may foreclose and take a decree for a deficiency, although the signer on taking up the note enters the sum paid in general account with the maker. Neither the mortgage nor the maker's personal liability is merged by such an entry. *Bendey v. Townsend*, 109 U. S. 665.

**Taking Time Mortgage from Principal as Collateral Security does not discharge Surety.**

See SURETYSHIP, 12.

**MORTGAGE — MORTGAGEE — Nature of Mortgagee's Interest.**

See pl. 1, 2.

**Right of Mortgagee to Possession, etc. — To Rents and Profits — To Proceeds of Foreclosure Sale — Proceeds of Insurance Policy.**

See pl. 3-10.



**MORTGAGE — MORTGAGEE — continued.**

*Liability of Mortgagee of Leasehold on Covenants of Lease — Liability of Mortgagee for Rents and Profits — To other Lien-holders — To Owner of Equity of Redemption.*

See pl. 11-15.

*Estopped to deny Prior Incumbrance of which he had Notice.*

See pl. 16.

1. — *Nature of Mortgagee's Interest.*] In Wisconsin, the legal title does not vest in the mortgagee on condition broken, but only on foreclosure and sale. *Russell v. Ely*, 2 Black, 575.

2. In New Hampshire, the interest of the mortgagee is treated as realty so far only as may be necessary to preserve his security. *Hutchins v. King*, 1 Wal. 53.

3. — *Right of Mortgagee to Possession, etc. — To Rents and Profits — To Proceeds of Foreclosure Sale — Proceeds of Insurance Policy.*] A mortgagee lawfully in possession after condition broken will not be turned out until his debt is paid; but this rule will not protect a mortgagee who procures possession by a collusive arrangement with a tenant of the mortgagor, whose lease has expired, and without the mortgagor's consent, as such a possession is not lawful. *Russell v. Ely*, 2 Black, 575.

4. One entitled to a lot on a "town site" on public land entered by the mayor under the act of March 2, 1867 (14 Sts. 541), has an equitable interest which may be the subject of a mortgage, and the mortgagee is entitled to the mayor's deed. *Hussey v. Smith*, 99 U. S. 20; *Hussey v. Merritt*, Id. 25.

5. A mortgagee is not entitled to rents and profits until he gets possession, although the mortgagor withholds possession contrary to agreement. And especially is this the rule in Oregon, where it is provided by statute that a mortgage shall not be deemed a conveyance such as to entitle the owner of the mortgage to possession without foreclosure and sale. *Teul v. Walker*, 111 U. S. 242.

6. A mortgagee of a part of a parcel of land embraced in a junior mortgage of the whole, cannot, by intervening in a proceeding to foreclose the junior mortgage, maintain a claim to any part of the proceeds of the foreclosure sale. His petition is properly dismissed without prejudice. *Woodworth v. Blair*, 112 U. S. 8.

7. Where a mortgagor of a building on land owned by a third person has obtained a decree against the owner of the land on his agreement to purchase the building, and there is no application of the interest on the decree until the court comes to make a final decree, so that there are two funds, the principal and the interest, the court, following the practice of courts of equity in marshalling securities, may direct payment to the mortgagee out of the interest, the mortgagee having been brought in by bill of interpleader.

**MORTGAGE — MORTGAGEE — continued.**

*Scruggs v. Memphis & Charleston Railroad Co.*, 108 U. S. 368.

8. If a mortgagor's covenant binds him to insure for the benefit of the mortgagee, the mortgagee, to the extent of his interest, will have a lien on the proceeds of a policy taken out by the mortgagor; and such is the rule in Louisiana. *Wheeler v. Factors' & Traders' Insurance Co.*, 101 U. S. 439.

9. And this is so, although the contract provides that, if the mortgagor fails to insure, the mortgagee may procure a policy at the mortgagor's expense. *Ib.*

10. A mortgagee in possession, who obtains insurance and pays the premium, is not accountable for the money he receives for a loss, under the policy. *Russell v. Southard*, 12 How. 139.

11. — *Liability of Mortgagee of Leasehold on Covenants of Lease — Liability of Mortgagee for Rents and Profits — To other Lien-holders — To Owner of Equity of Redemption.*] Whether a mortgagee of a leasehold interest is liable as an assignee on the covenants in the lease, although he has never had possession, *quære*. *Calvert v. Bradley*, 16 How. 580.

12. A mortgagee who claims title under a foreclosure void for want of notice is not liable for rents and profits, where he has no such possession as gives actual enjoyment and pernancy thereof. *Bigler v. Waller*, 14 Wal. 297.

13. Under a finding that the defendant's possession of certain land was under an instrument in fact a mortgage, although in form a deed, and a decree that the plaintiff might redeem on payment of the loan with interest, and that the defendant be charged a reasonable sum for his use and occupation of the premises, the defendant is chargeable with nothing on this score, his possession being constructive only and the land unenclosed without buildings, nor because, but for his claim of ownership, the plaintiff might have sold the land at a time when it had risen in value, but from which value it soon fell. *Peugh v. Davis*, 113 U. S. 542.

14. Where property, subject to mortgage and other liens, is sold by the first mortgagee, under a power, he becomes the trustee for the benefit of all concerned; but if he duly regard the interests of all and keep within the scope of his authority, equity will not hold him responsible for mere errors of judgment or results, however unfortunate, which he could not reasonably have anticipated. *Markey v. Langley*, 92 U. S. 142.

15. One who holds the strict legal title, with no right other than a lien for a given sum, on selling to an innocent purchaser, must account to the owners of the equity of redemption for all he receives beyond that sum. *Shillaber v. Robinson*, 97 U. S. 68.

16. — *Estopped to deny Prior Incumbrance of which he had Notice.*] Where a mortgage is expressly subject to a prior mortgage for the security of negotiable bonds already in circulation,

**MORTGAGE — MORTGAGEE — continued.**

the junior mortgagee and all who claim under him are estopped from denying either the validity or the amount of the bonds in the hands of *bona fide* holders. *Bronson v. La Crosse & Milwaukee Railroad Co.*, 2 Wal. 283.

*Lessee remaining in Possession — When deemed Mortgagee in Possession.*

See LANDLORD AND TENANT, 10.

*Not a Terre-tenant entitled to Notice on Scire Facias to revive Judgment.*

See JUDGMENT — ACTION, 5.

*Prior Mortgagee not Necessary Party to Bill to foreclose.*

See MORTGAGE — FORECLOSURE, 17, 22, 24, 26.

*Release to Mortgagee in Possession may be valid, but subject to Close Scrutiny.*

See MORTGAGE — GRANTEE OF EQUITY, 2-4.

*Right to Insurance written for Mortgagor.*

See INSURANCE — FIRE, 28, 29.

*What constitutes one a Mortgagee rather than a Trustee.*

See TRUST — TRUSTEE, 8.

**MORTGAGE — MORTGAGOR — Power to deal with Mortgaged Property — Estopped to deny his Seisin in Suit to foreclose — Power to maintain Ejectment against Mortgagee — Release by Election of other Remedies.]** Until a bill is filed to foreclose, the mortgagor may deal with third persons, in regard to the mortgaged property, at his pleasure, subject to the terms of the mortgage, as, *e. g.*, by leasing it or by confessing judgment. *Bronson v. La Crosse & Milwaukee Railroad Co.*, 2 Wal. 283.

2. The mortgagor is estopped from denying his seisin in a suit to foreclose the mortgage. *Bush v. Marshall*, 6 How. 284.

3. A mortgagor having, as between himself and the mortgagee, an equitable title only, cannot, after a breach, maintain ejectment against the mortgagee in possession, or one in possession under him; nor can he, it seems, until he has redeemed, although he has paid or offered to pay the mortgage debt. *Brobst v. Brock*, 10 Wal. 519.

4. Where a creditor's bill was dismissed because there had been no judgment at law, etc., to found the jurisdiction, but the cause was retained for the closing of the receiver's accounts, and the debtors obtained a decree by which the receiver was adjudged to have received a mortgage belonging to the debtors, and was ordered to pay the amount thereof into court, and the debtors, on default of the receiver, making no claim against the mortgagor, took out *sc. fa.* against the sureties in the receiver's bond, it was held, the receiver having taken a new mortgage and transferred it to the creditors, that the debtors, by electing to charge the receiver, had

**MORTGAGE — MORTGAGOR — continued.**

affirmed his dealing with, and relinquished their claim against, the mortgagor. *Brown v. Bass*, 4 Wal. 262.

*Possession not adverse to Mortgagee's.*

See LIMITATION — ADVERSE POSSESSION, 46.

**MORTGAGE — PAYMENT — What amounts to Payment — Effect of Payment on Property in Severed Timber — Presumption of Payment.]**

Where one, bound under an agreement, made on a division of land to pay a mortgage on the whole, borrows money on a mortgage of his portion, promising with it to procure a release of such portion, but puts it to other use, the lender, who afterwards takes money furnished by the borrower, and with knowledge of the original agreement pays the original mortgage debt and takes an assignment of the mortgage, cannot enforce the mortgage against the portion of the original co-owner. The mortgage is paid; nor has the doctrine of subrogation any application to the case. *Richardson v. Traver*, 112 U. S. 423.

2. Where the mortgage debt is paid, the property in timber which has been severed without the consent of the mortgagee reverts in the mortgagor or his assignee. *Hutchins v. King*, 1 Wal. 53.

3. Presumption of payment of a mortgage cannot arise, it seems, from lapse of time against a mortgagee or his assigns in possession, certainly where the mortgagor died insolvent before the debt fell due, and where the purchaser of his equity also became insolvent before it fell due, and removed from the state and never afterwards returned. *Brobst v. Brock*, 10 Wal. 519.

*Discharge by Executor on Payment in Confederate Currency, invalid.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 21.

**MORTGAGE — POWER OF SALE — When Sale may be made — When Right of Cestui que Trust to a Sale is barred — What may be sold — Who may purchase — Effect of Conveyance under such Power.**

See pl. 1-9.

*Proceedings in the making of Sale — Power to be strictly followed — Notice — Defects cured by Neglect of Mortgagor to object.*

See pl. 10-16.

1. — *When Sale may be made — When Right of Cestui que Trust to a Sale is barred — What may be sold — Who may purchase — Effect of Conveyance under such Power.]* Under the authority conferred by the deed of trust herein, the trustee was authorized to sell for an installment of interest due and unpaid, although the principal sum was not due, and although the deed did not show that any interest was due be-

**MORTGAGE — POWER OF SALE — continued.**

fore the note became due, the note being referred to in the deed. *Richards v. Holmes*, 18 How. 143.

2. Where a deed of trust with power of sale is conditioned to secure the payment of money in several instalments, and provides that on default of payment of any one or part thereof the trustee may "enter upon all and singular the premises thereby granted, and sell and dispose of the same," and out of the proceeds retain the principal and interest due, rendering to the grantor the surplus, the trustee may enter and sell on the premises on the first default. *Olcott v. Bynum*, 17 Wal. 44.

3. A deed of trust to sell and pay a note, in case of an action brought thereon, may be executed, although the note has been turned into a judgment, and more than the time necessary to bar a debt under the statute of limitations has elapsed. *Metropolis Bank v. Guttschlick*, 14 Pet. 19.

4. A trust was created in favor of creditors under which any one of them might require a sale of the trust property and payment of the debts after a certain time, but no step was taken to that end for nineteen years after that time. It was held, the delay being unaccounted for, that although no statute bar existed, a claim to an execution of the trust was stale, and that equity would not interfere. *McKnight v. Taylor*, 1 How. 161.

5. Where the premises consist of land with timber, water-power, and mines and furnaces for working the same, and are therefore such that a sale in parts cannot be made to advantage, the sale may be on the premises, and of the entire property, and not merely of enough to pay the sum due (the sum secured being payable in instalments), and wholly for cash, and not for payment in instalments maturing so as to meet the instalments of the mortgage debt, and the surplus remaining after payment of the sum due may be retained and applied as a court of equity would apply it to the extinguishment of the debt; and it makes no difference that the property is large and valuable, and situated in a remote section unfrequented by buyers. *Olcott v. Bynum*, 17 Wal. 44.

6. A creditor, for whom a sale is made under a deed of trust, may become the purchaser on a bid left by him with the auctioneer, if the bid be the highest that can be obtained. *Richards v. Holmes*, 18 How. 143.

7. A sale will not be set aside because the land was bid off by a corporation of which the trustee was an officer, nothing appearing to show unfairness. *Clark v. Freedman's Savings & Trust Co.*, 100 U. S. 149.

8. A sale of real estate, made under a power contained in a deed of trust executed before the civil war, to secure the payment of promissory notes, is valid, although the grantors were citizens and residents of an insurrectionary state,

**MORTGAGE — POWER OF SALE — continued.**

and the war was flagrant when the sale was made. *Washington University v. Finch*, 18 Wal. 106.

9. A conveyance to trustees, in trust to sell and apply so much of the proceeds as may be needed therefor in payment of a debt, is not a purchase of the land by the creditor. *Neilson v. Lagow*, 12 How. 98.

10. — *Proceedings in the making of Sale — Power to be strictly followed — Notice — Defects cured by Neglect of Mortgagor to object.* A sale under a power in a trust deed has no validity unless made in strict conformity to the prescribed directions. *Skilaber v. Robinson*, 97 U. S. 68.

11. Where a mortgage giving a power of sale provides that the trustee shall give certain notice, a sale without notice confers no title. *Bigler v. Waller*, 14 Wal. 297.

12. The description of the property in a notice of a sale is sufficient, if it describe the property with such reasonable certainty as to inform the public of the property to be sold. *Newman v. Jackson*, 12 Wheat. 570.

13. A trustee authorized to sell for the use of a creditor, after advertising the time and place of sale, may postpone the sale from time to time in the exercise of a fair discretion, if due notice be given of the postponement. *Richards v. Holmes*, 18 How. 143.

14. Where a sale is fairly made under the power given by a deed of trust, and the trustee's deed to the purchaser is defective, the sale will not be declared invalid, but the purchaser is entitled to have the defect remedied by the execution of a new deed, if necessary. *Clark v. Freedman's Savings & Trust Co.*, 100 U. S. 149.

15. A sale of land, under the power given by a deed of trust to secure a debt, will not be set aside because the price brought was inadequate, the inadequacy not being such as to shock the conscience or raise a presumption of fraud or unfairness. *Ib.*

16. Where mortgaged property is sold under a power, any mere defect in the sale is cured by neglect of the mortgagor to object. *Markey v. Langley*, 92 U. S. 142.

**MORTGAGE — PRIORITY — Priority as to other Mortgages — As to other Incumbrances — As affected by Sale of Property — Registration.**

1. — *Priority as to other Mortgages.* In New York, a mortgage for a past indebtedness, if taken without notice of one for an indebtedness to be subsequently incurred, has precedence if first recorded. *Genesee National Bank v. Whitney*, 103 U. S. 99.

2. A mortgage of land taken and recorded without notice of an older unrecorded mortgage takes precedence thereof; and such was the rule in Utah, even before the passage of the statute of February 20, 1874, distinctly so declaring

**MORTGAGE — PRIORITY — continued.**

such being the implication from prior statutes. *Neslin v. Wells*, 104 U. S. 428.

3. Where, to secure the payment of a promissory note, the maker executes a trust deed of land, the deed authorizing the trustees to release on payment of the note, which, before maturity, is transferred to an innocent indorsee for value, and after the transfer the trustees and the payee of the note execute a release, reciting that the note has been paid, and the release, like the deed, is recorded, the rights in the land of the payee of another note secured by another deed of trust, afterwards made to one having no notice other than that afforded by the record, are paramount to the rights of the indorsee of the first note. *Williams v. Jackson*, 107 U. S. 478.

4. — *Priority as to other Incumbrances.* A trust deed, valid under the law of the state in which the parties resided on its execution, and there duly recorded, held to protect the title from the subsequent creditors of the grantor in another state on removal of the grantor and the *cestui que trust* into that state to reside. *United States Bank v. Lee*, 13 Pet. 107.

5. A mortgagee, who might have taken possession of the mortgaged property, or filed a bill to foreclose and for a receiver of the income, will be postponed, as to his claim for such income received and unexpended by the mortgagor, to the claim of a judgment creditor of the mortgagor, who, after a return of an unsatisfied execution, seeks by bill in equity to reach such income; and this, although the mortgagee file his bill to reach the income before the creditor's bill is filed. *American Bridge Co. v. Heidelberg*, 94 U. S. 793.

6. Where A. and B., tenants in common of land, borrowed money, giving a deed of trust on the land to secure its repayment, and, payment being delayed, a sale was made at which B. bought the land, and gave another deed of trust to secure the debt, and an additional deed of trust to secure A.'s one-half part of the difference between the amount of the debt and the amount of B.'s bid, the deed of trust to A. not, however, being accepted or recorded, and the creditor having caused a sale to be had for a default in payment of the amount secured by the second deed, and all the parties, by their conduct, having acquiesced in the second sale, it was held that A. had waived any rights which he might have claimed under the first sale, and that therefore his claim must be postponed to the claim of the creditor, at least to the amount originally secured by the first trust deed. *Mellen v. Wallach*, 112 U. S. 41.

7. Where a state, having a mortgage on the property of a canal company, waives its lien so far as to permit the company to use so much of its revenues as is necessary for the expenses of maintaining the canal, a general creditor of the company who has notice of the facts will be restrained at the instance of the state from levying on earnings of the company deposited by it in

**MORTGAGE — PRIORITY — continued.**

bank to meet necessary expenses. *Macalester v. Maryland*, 114 U. S. 593.

8. — *Priority as affected by Sale of Property.* Where real estate bound by a judgment or mortgage is alienated in parcels at different times to various persons, the parcels should be subjected to the satisfaction of the lien in the inverse order of alienation. *National Savings Bank v. Creswell*, 100 U. S. 630.

9. Where property subject to mortgage and to other liens is sold by the first mortgagee under a power in his mortgage, the several liens attach to the proceeds in the same manner and order and to the same effect as to the premises before the sale. *Markey v. Langley*, 92 U. S. 142.

10. — *Registration.* A provision of law requiring tacit mortgages to be recorded, in order to affect third persons, does not deprive of a right to property, within the meaning of the fourteenth amendment, a minor who, under the prior law, had such a mortgage on his tutor's property, ample time — nine months or more, for instance — being given for compliance therewith. *Vance v. Vance*, 108 U. S. 514.

11. The record of a mortgage being constructive notice to all the world, mere silence of a mortgagee respecting a mortgage duly recorded cannot be construed as laches precluding an assertion of the mortgage against a subsequent purchaser without actual notice. *Dick v. Balch*, 8 Pet. 30.

12. Under article 3333 of the Louisiana civil code, requiring reinscription of mortgages and privileges after ten years, it is the inscription, not the mortgage or privilege, that ceases to have effect if the reinscription be not made. *Patterson v. De la Ronde*, 8 Wal. 292.

13. The trustee and *cestui que trust* under a deed to secure a debt are deemed purchasers, and are not charged with notice of unrecorded claims on the land otherwise than as a purchaser would be charged. *Kesner v. Trigg*, 98 U. S. 50.

*Title of Purchaser at Execution Sale superior to that under Unrecorded Mortgage.*

See EXECUTION, 48.

**MORTGAGE — REDEMPTION — Who may redeem — When — Right to Rents and Profits.**

One who, under a contract of purchase, is in the open, visible, and exclusive possession of mortgaged land, is entitled to redeem from a foreclosure sale had in proceedings to which he was not made a party. *Noyes v. Hall*, 97 U. S. 34.

2. To redeem property irregularly sold on foreclosure, the tender must be of a sum equal not merely to the amount paid by the purchaser, but to the mortgage debt. *Collins v. Riggs*, 14 Wal. 491.

3. If a junior incumbrancer would redeem property bought by a senior incumbrancer at a sale under the senior deed of trust, he is bound to pay the senior incumbrance, with interest,

**MORTGAGE — REDEMPTION — continued.**

taxes, sums paid for insurance and repairs, etc., less the rents and profits during the possession of the senior incumbrancer. *McCormick v. Knox*, 105 U. S. 122.

4. Twenty years' possession under a *de facto* foreclosure of a mortgage is a bar to redemption, although the proceedings to foreclose were irregular, unless the mortgagor accounts for the delay, and shows a valid right to redeem. *Slicer v. Pittsburg Bank*, 16 How. 571.

5. An account of rents and profits is not necessarily incident to a redemption by the mortgagor; his laches may operate as a waiver of any right thereto. *Russell v. Southard*, 12 How. 139.

*Decisions of State Courts respecting Redemption, etc., followed by Federal Courts.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 60, 69.

*Law extending Time impairs Obligation of Contract.*

See CONTRACT — IMPAIRMENT OF OBLIGATION, 75, 76.

*Payment of Money on Redemption.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 141.

*State Laws fixing Interest to be paid on Redemption, Rules of Decision in Federal Courts.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 104.

**MORTGAGE — SUBROGATION — Between Joint Mortgagors — Senior and Junior Incumbrancers.]** If three persons mortgage their joint property to indemnify an accommodation drawee of bills, and one of them be compelled to pay the bills, the mortgage, on notice to the mortgagee, will stand in equity as security to the payer for repayment of two thirds of the sum paid. *Pratt v. Law*, 9 Cranch, 456. And see *Campbell v. Pratt*, 5 Wheat. 429.

2. Although a junior incumbrancer, on payment of a prior incumbrance, has a right to be subrogated to the place of the prior incumbrancer, that right may be controlled by acts of the parties indicating a different intention. *United States Bank v. Peter*, 13 Pet. 123.

*Equitable Owner of Land who has paid a Mortgage thereon may set it up to defeat an Ejectment.*

See EJECTMENT — IN GENERAL, 25.

*Purchaser from United States of Property sold in Confiscation Proceedings — Subrogation to Rights of Mortgagee.*

See SUBROGATION, 3.

**MORTGAGE — VALIDITY — Validity as affected by Want of Consideration — By Failure to record.**

See pl. 1-4.

**MORTGAGE — VALIDITY — continued.**

*Mortgages to secure Future Advances, etc. — Of subsequently acquired Property and Property subsequently severed.*

See pl. 5-11.

*Effect of Judgment of Validity.*

See pl. 12.

1. — *Validity as affected by Want of Consideration — By Failure to record.]* It is no defence to a suit to foreclose a mortgage that the consideration was paid in bills of a fraudulent bank, which were void in law and proved worthless in fact, the bills having been current when paid, and having been paid out by the mortgagor without loss and without liability. *Orchard v. Hughes*, 1 Wal. 73.

2. One who has been induced to mortgage land to secure his subscription to the stock of a railroad company cannot repudiate the mortgage on proof that such statements were made to him as an inducement for his subscription as that the road would pay thirty per cent dividend, that he would get the products of his land to market much more cheaply, etc., no misrepresentation of existing facts being shown. *Sawyer v. Prickett*, 19 Wal. 146.

3. Where one takes a mortgage to secure a supposed indebtedness of the mortgagor purchased from his creditor by the mortgagee, and the indebtedness has, in fact, been paid, although mortgagor and mortgagee both suppose otherwise when the mortgage is taken, the mortgage is invalid as against the mortgagor's other creditors. *Wood v. Weimar*, 104 U. S. 786.

4. As between the parties to a mortgage of land in Louisiana and their heirs, the failure to inscribe or to reinscribe it does not affect its validity. *Cucullu v. Hernandez*, 103 U. S. 105.

5. — *Mortgages to secure Future Advances, etc. — Of subsequently acquired Property and Property subsequently severed.]* Mortgages may be given to secure future advances and contingent debts, as well as debts that are due and certain. *United States v. Hooe*, 3 Cranch, 73; *Conard v. Atlantic Insurance Co.*, 1 Pet. 386; *Conard v. Nicoll*, 4 Pet. 291; *Lawrence v. Tucker*, 23 How. 14.

6. Thus, a mortgage given to secure a note for five thousand five hundred dollars, and future advances to the extent of six thousand more, is a standing security for eleven thousand five hundred, if so intended and duly recorded, and may be valid for that amount against subsequent purchasers or incumbrancers, without regard to the amount advanced at the time the mortgage and note were executed. *Lawrence v. Tucker*, 23 How. 14.

7. A mortgage purporting to secure the repayment of a sum certain may stand as security for the repayment of part of that sum, and as indemnity to the mortgagee for liabilities, if there be no fraudulent intent. *Shirras v. Caig*, 7 Cranch, 34.

**MORTGAGE — VALIDITY — continued.**

8. A mortgage of property yet to be acquired by the mortgagor may be valid and attach to the property as it comes into the mortgagor's possession; *e. g.*, of a railroad yet to be constructed, and of rolling-stock and other property appurtenant thereto yet to be purchased. *Pennock v. Coe*, 23 How. 117.

9. And the lien of such a mortgage will be superior to that of a subsequent mortgage or judgment. *Ib.*

10. The lien created by a mortgage on crops not in existence attaches when the crops are grown. *Butt v. Ellet*, 19 Wal. 544.

11. Growing timber is a part of the realty, and covered by a mortgage thereof; and the lien of the mortgage is not impaired by a severance without his consent. *Hutchins v. King*, 1 Wal. 53.

12. — *Effect of Judgment of Validity*]. If the validity of a mortgage be tried and adjudicated in chancery, the decree binds parties and privies in an action of ejectment on the same mortgage. *Smith v. Kernochen*, 7 How. 198.

*Badge of Fraud — That Mortgage covers more than enough to pay the Debt, not.*

See FRAUDULENT CONVEYANCE, 6.

*Conditioned to save harmless Accommodation Indorser of Subsequent Notes — Prima Facie valid.*

See FRAUDULENT CONVEYANCE, 2.

*Determinable in Bankruptcy Proceedings, when.*

See BANKRUPTCY — JURISDICTION, 26.

*Executed by Member of a Firm assuming to be a Corporation.*

See PARTNERSHIP, 26.

*Ignorance of Grantor does not avoid, if Mortgage was read and explained to him.*

See EVIDENCE — EXTRINSIC OR PAROL, 26.

**MORTMAIN — Statutes not in Force in Ohio.**

See CHARITY, 10.

**MOTION — Dismissal — On Appeal or Error.**

See APPEAL AND ERROR — PROCEEDINGS ABOVE.

*New Trial — Motion for.*

See NEW TRIAL.

*Pleading in Equity.*

See EQUITY PLEADING — BILL, 9 *et seq.*

*What Supreme Court will hear on Motion.*

See SUPREME COURT — PRACTICE, 28 *et seq.*

**MOTIVE — Intention — In general.**

See INTENT.

**MUNICIPAL BONDS — Actions thereon — In general.**

See MUNICIPAL BONDS — ACTION.

*Coupons — In general.*

See MUNICIPAL BONDS — COUPONS.

**MUNICIPAL BONDS — continued.**

*General Matters.*

See MUNICIPAL BONDS — IN GENERAL.

*Negotiability — In general.*

See MUNICIPAL BONDS — NEGOTIABILITY.

**MUNICIPAL BONDS — ACTION —** *When holder may sue — Auditing as a Prerequisite to Action — Pleading — Evidence — Burden of Proof — Judgment as a Bar.*] By the statutes of Illinois, and the decisions of her courts, municipal bonds payable to bearer are transferable by delivery, and the holder thereof can sue on them in his own name. *Roberts v. Bolles*, 101 U. S. 119; *Ottawa v. National Bank*, 105 U. S. 342.

2. A claim against a county on bonds, regularly issued, under authority, *inter alia*, from the county court, may be deemed audited by that court when the bonds are issued; and no further presentment for allowance is necessary as a prerequisite to an action on the bonds, although the state law require the auditing of all claims against counties. *Green County v. Daniel*, 102 U. S. 187.

3. In a suit on negotiable municipal bonds, the declaration need not aver the performance of conditions prerequisite to their issue. Defects in the performance of such conditions are properly matter of defence. *Lincoln v. Cambria Iron Co.*, 103 U. S. 412; *Clay County v. Society for Savings*, 104 U. S. 579.

4. Where, in assumpsit on municipal bonds, the declaration alleges their issue and their purchase by the plaintiff for value before maturity, a plea of the general issue puts in issue the questions of authority to issue, *bona fides*, and notice. *Chambers County v. Clews*, 21 Wal. 317.

5. In a suit against the maker of negotiable paper, the plaintiff may show himself to be a *bona fide* holder for value by showing that a previous holder was such. *Montclair v. Ramsdell*, 107 U. S. 147.

6. Where the defendant in an action on a negotiable instrument shows strong circumstances of fraud in its inception, the burden is on the plaintiff of proving that he purchased for value before maturity. *Smith v. Sac County*, 11 Wal. 139.

7. The burden of proving that a subscription by a city to the stock of a railroad company was "ratified by a majority of the taxpayers," at a poll to be opened for that purpose, is met by introducing in evidence the poll-books containing the name of each voter and a record of his vote, such books being authenticated by the certificate of the judges and clerks of the election, stating the result and specifying the number of votes for and against the subscription, the city charter providing that taxpayers only should vote. It is not necessary to go further and show that a majority of those voting were in fact taxpayers. *Hannibal v. Fauntleroy*, 105 U. S. 408.

8. The plaintiff in an action on municipal bonds is not bound to show himself a *bona fide*

**MUNICIPAL BONDS — ACTION — continued.**

holder for value where the defence relied on is an irregularity in the conduct of the election in pursuance of which they were issued. The case is not one where, fraud or illegality in the inception of a negotiable instrument being shown, the burden of proving himself a *bona fide* holder for value rests on the plaintiff. *Pana v. Bowler*, 107 U. S. 529.

9. A judgment against the plaintiff in a suit on coupons originally attached to municipal bonds, grounded on a failure to prove that he gave value, the bonds being void in the hands of one not a *bona fide* holder for value, does not estop him from showing, in another action on other coupons originally attached to the same bonds, and on other bonds of the same series, that he gave value for such other bonds and coupons. [CLIFFORD, J., dissenting.] *Cromwell v. Sac County*, 94 U. S. 351.

10. A finding in an action on coupons, that the plaintiff is the holder and owner, does not estop the defendant, in a subsequent action thereon by another party, from showing equitable ownership throughout in the second party plaintiff, the finding being conclusive only of the legal title. *Ib.*

*Circuit Court — Suit by Holder who has taken Assignment to found Jurisdiction.*

See **CIRCUIT COURT — JURISDICTION**, 125-128.

*Coupons — Action on — Period of Limitation.*

See **LIMITATION — STATUTES**, 11, 12.

*Municipality sued on Bonds not estopped to show Invalidity of Statute under which they were issued.*

See **STATUTE — ENACTMENT**, 14.

*Suit to have Bonds declared invalid — Removal from State Court.*

See **REMOVAL OF CAUSES**, 29.

**MUNICIPAL BONDS — COUPONS — Negotiability — What Plaintiff must show — Interest — Presentation — Bond not affected by Dishonor of Coupon.]** Interest coupons, separable from the bonds to which they belong, and payable to bearer, are negotiable. *Thomson v. Lee County*, 3 Wal. 327; *Walnut v. Wade*, 103 U. S. 683.

2. And pass by delivery. *Murray v. Lardner*, 2 Wal. 110; *Hotchkiss v. Shoe & Leather National Bank*, 21 Wal. 354; *Walnut v. Wade*, 103 U. S. 683.

3. And a purchaser thereof in good faith is unaffected by want of title in the vendor. *Murray v. Lardner*, 2 Wal. 110; *Hotchkiss v. Shoe & Leather National Bank*, 21 Wal. 354.

4. A coupon payable to the holder is payable to the bearer. The terms are equivalent. *Koshkonong v. Burton*, 104 U. S. 663.

5. The holder of coupons separable from the bonds to which they belong, may sue thereon without producing or showing any interest in

**MUNICIPAL BONDS — COUPONS — continued.**

the bonds. *Knox County Commissioners v. Aspinwall*, 21 How. 539; *Knox County Commissioners v. Wallace*, 1d. 546; *Thomson v. Lee County*, 3 Wal. 327; *Kenosha v. Lamson*, 9 Wal. 477.

6. The declaration in such case, by way of inducement, may recite the bonds in a general way, explaining and bringing into view the relation of the coupons to the bonds, and does not thereby become a declaration on the bonds. *Kenosha v. Lamson*, 9 Wal. 477.

7. Coupons of municipal bonds bear interest from the day when they are payable. *Walnut v. Wade*, 103 U. S. 683.

8. One who recovers in an action on coupons of municipal bonds payable to bearer is entitled to interest and exchange at the place where, by their terms, they are made payable. *Gelpcke v. Dubuque*, 1 Wal. 175; *Pana v. Bowler*, 107 U. S. 529.

9. And a failure to present them for payment does not prevent the running of interest, it not appearing that the municipality had money ready to pay them at the time and place designated in them. *Walnut v. Wade*, 103 U. S. 683.

10. The fact that they are made payable at a particular place does not make it necessary to aver or prove presentation there for payment. *Ib.*

11. Overdue and unpaid interest coupons attached to a municipal bond not yet due do not render the bond and the subsequently maturing coupons dishonored paper, so as to subject them, in the hands of a purchaser for value, to defences good against the original holder. *Cromwell v. Sac County*, 96 U. S. 51; *Indiana & Illinois Railway Co. v. Sprague*, 103 U. S. 756.

*Overdue Coupons bear Interest.*

See **INTEREST**, 8, 17.

**MUNICIPAL BONDS — IN GENERAL — Issue —**

*In Aid of Railroads — What Company entitled to Benefit of Subscription — Effect of Division, Consolidation, etc.*

See pl. 1-18.

*Subscription and Agreement to subscribe.*

See pl. 19-23.

*Who Proper Officials to issue.*

See pl. 24-31.

*Conditions — What constitute — Effect.*

See pl. 32-38.

*Registration — Various Statutes — Construction.*

See pl. 39-43.

*Effect of Issue pending Litigation.*

See pl. 44-50.

*Prerequisites, in general, to Validity of Subscription and Issue.*

See pl. 51-70.

*Immaterial Irregularities — What are.*

See pl. 71-83.

**MUNICIPAL BONDS — IN GENERAL — continued.**

*Liability of County on Township and Precinct Bonds.*

See pl. 84-87.

*Recitals in Bonds — Effect by Way of Estoppel and otherwise.*

See pl. 88-112.

*Ratification by Municipality — What constitutes.*

See pl. 113-117.

*Ratification by Legislature — Power — Effect.*

See pl. 118-133.

*Purchaser for Value — Who protected, as such.*

See pl. 134-136.

*Modification of Contract.*

See pl. 137-139.

*Defences to Actions on Bonds — What constitutes a Defence.*

See pl. 140-158.

*Liability notwithstanding Invalidity of Bond.*

See pl. 159, 160.

1. — *Issue — In Aid of Railroads — What Company entitled to Benefit of Subscription — Effect of Division, Consolidation, etc.* Authority given by the voters of a county, pursuant to statute, for a subscription to the stock of a certain railroad company, does not authorize a subscription to stock of a company created by a division of the original road. *Marsh v. Fulton County*, 10 Wal. 676.

2. Although a subscriber for stock in a railroad company may be released by a subsequent fundamental alteration of its charter, or a radical change in its organization or purposes, this rule is inapplicable where the change is contemplated by the charter or by the general law, as, for instance, a county having subscribed to the stock of a company authorized both by its charter and by the general law to effect a consolidation with another company, cannot escape liability on bonds issued after the consolidation in payment of a subscription made before. [MILLER and DAVIS, JJ., dissenting.] *Nugent v. Putnam County Supervisors*, 19 Wal. 241.

3. Where a township is empowered to subscribe for stock of a railroad company when authorized by the consent of a certain number of voters, the authority, under such consent, of officers charged with the duty of making the subscription, is, in effect, revoked by a consolidation of the company with another, although the consolidation is made under a statute declaring the new company entitled to all the rights of the old companies, the subscription not having been made, and no vested rights having accrued. *Harshman v. Bates County*, 92 U. S. 569; *Bates County v. Winters*, 97 U. S. 83 [CLIFFORD, SWAYNE, and STRONG, JJ., dissenting].

4. Power given to municipalities to subscribe

**MUNICIPAL BONDS — IN GENERAL — continued.**

to the stock of a railroad corporation may be exercised in favor of a corporation formed by consolidation with another corporation, the functions of the consolidated corporation and the route of its road being substantially similar to those of the original corporation. *Scotland County v. Thomas*, 94 U. S. 682 [MILLER, J., dissenting]; *East Lincoln v. Davenport*, Id. 801; *Schuyler County v. Thomas*, 98 U. S. 169; *Wilson v. Salamanca*, 99 U. S. 499; *Empire Township v. Darlington*, 101 U. S. 87; *Menasha v. Hazard*, 102 U. S. 81; *Unity v. Burrage*, 103 U. S. 447; *Harter v. Kernochan*, 103 U. S. 562; *Bonham v. Needles*, 103 U. S. 648; *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73; *Chickaming v. Carpenter*, 106 U. S. 663; *Bates County v. Winter*, 112 U. S. 325.

5. So, where the corporation in whose favor the subscription is made transfers its franchises, after subscription is made the bonds may issue, notwithstanding. *Henry County v. Nicolay*, 95 U. S. 619; *Ray County v. Vansycle*, 96 U. S. 675.

6. And it makes no difference that the corporation with which the consolidation is effected is a foreign corporation. *Scotland County v. Thomas*, 94 U. S. 682; *Schuyler County v. Thomas*, 98 U. S. 169; *Wilson v. Salamanca*, 99 U. S. 499; *Menasha v. Hazard*, 102 U. S. 81.

7. A municipal corporation, when sued by a *bona fide* holder for value of bonds issued in aid of a certain railroad company, cannot defend on the ground that when the election under the authority of which the bonds were issued was held and when the bonds were issued no company of that name existed, it being created afterwards by consolidation with a company existing at the time, the consolidation having been authorized and effected ten years before, and the county having received, held, and sold its stock. *Leavenworth County v. Barnes*, 94 U. S. 70.

8. A statute authorizing a city to lend its credit to a specified railroad company, and to "any other railroad company duly incorporated and organized" which in the opinion of the common council are entitled to such aid, authorizes a loan of credit to a company incorporated and organized after, as well as to one incorporated and organized before, its enactment. *James v. Milwaukee*, 16 Wal. 159.

9. Where the charter of a railroad company authorized the company to borrow money, and a county in which the greater part of the road was to lie to sell certain of its lands to aid in its construction, and, by a subsequent section, authorized "any county through which" the road might run and "every county through which any other railroad" might run, with which that road might "be joined, connected, or intersected," to aid in the construction "of the same or of such other road" with which it might so connect, and, to that end, provided that the provi-



**MUNICIPAL BONDS — IN GENERAL — continued.**

sions of the prior sections should "extend, include, and be applicable to every such county and every such railroad," it was held, another company having been chartered to build a road to run on from the terminus of the road of the former company through an adjoining county, and the former company having undertaken its construction, that the authority and the contract for the construction of the second road formed a connection within the meaning of the statute, and, so far, met the conditions on which the adjoining county might mortgage its lands. *Kennicott v. Wayne County Supervisors*, 16 Wal. 452.

10. Where a charter of a railroad company authorized counties through which the road might pass to subscribe to its stock and to issue bonds in payment therefor, neither the location nor the building of the road within a county was a condition precedent to the issuing of its bonds. *Woods v. Lawrence County*, 1 Black, 386.

11. Nor can an omission of the names of the counties in the act be construed to indicate an assent by the legislature to a want of power to authorize subscriptions by counties through which the road might not pass. *Ib.*

12. A power given to a city to take stock in any corporation for making "a road or roads to said city," was held to authorize a subscription for stock in a corporation organized to construct a road between two other cities in extension of a road leading directly from the nearer of those cities to the city subscribing. *Van Hostrup v. Madison*, 1 Wal. 291.

13. Where a statute authorizes subscriptions to the stock of a certain railroad company whose road is not yet located, by "any county in which any part of the route of said railroad may be," a county through which, under the language used to fix the location, the road may run, and, in fact, when built, does run, is empowered to subscribe. *Callaway County v. Foster*, 93 U. S. 567; *Schuyler County v. Thomas*, 98 U. S. 169.

14. Under a statute which, like the Kansas statute of February 10, 1865, authorizes subscriptions by any county "to, into, through, from, or near which . . . any railroad is or may be located," the election required may be held and the subscription made before the actual location of the road, it being, in fact, located and built before the issue of the bonds. *Johnson County Commissioners v. Thayer*, 94 U. S. 631.

15. Nor, under such a statute, is it material that no particular railroad company was named in the submission to the voters, the submission describing the route contemplated with reasonable particularity. *Ib.*; *Block v. Bourbon County Commissioners*, 99 U. S. 686.

16. Nor can it be objected that the issue of bonds was to a corporation of another state answering the description given in the submission on which the vote was had. *Block v. Bourbon County Commissioners*, 99 U. S. 686.

**MUNICIPAL BONDS — IN GENERAL — continued.**

17. Where, under a statute authorizing townships to issue bonds in aid of railroads which it was proposed to build "into, through, or near" them, bonds were issued in aid of a road which it was proposed to build nine miles away, it was held, the bonds reciting on their face a compliance with the statute, the qualified voters having voted in favor of their issue, and the township having paid three years' interest on them, that the plaintiff, a *bona fide* holder for value, was entitled to recover on them. *Kirkbride v. Lafayette County*, 103 U. S. 208.

18. Under a contract between a city and a railroad company, under which bonds of the city are to be delivered to the company on the building of a railroad and bridge within a certain time, the assignee of the company is entitled to the bonds on doing the work, and, the bridge affording the city adequate communication, it is immaterial that it was built on the line of another road entering the city. *Winona v. Cowdrey*, 93 U. S. 612.

19. — *Subscription and Agreement to subscribe.* The power of a municipal corporation to subscribe to the stock of a railroad company includes the power to agree to subscribe, and a resolution agreeing to subscribe may be effectual to bind the municipality, even though no subscription on the books of the company is made, where the agreement is, in effect, a subscription, no further action being contemplated, and it being recognized and acted on as such. *Moultrie County v. Rockingham Ten-Cent Savings Bank*, 92 U. S. 631; *Cass County v. Gillett*, 100 U. S. 585.

20. The liability of a county on bonds issued in payment of a subscription in aid of a railroad does not depend on a formal subscription, if the county supervisors have adopted a resolution declaring the subscription made, and have been notified of its acceptance by the company, and if, furthermore, the county has accepted stock certificates, voted on them, and levied a tax for interest. *Nugent v. Putnam County Supervisors*, 19 Wal. 241.

21. Where, however, after an election authorizing a subscription to the stock of a certain company, the county court authorized an agent to make the subscription on the books of the company, and to have copied on the books the order of the court, to show the conditions on which the subscription was made, and to report to the court, and the agent reported that he had made no subscription because the company had no books, and for other reasons, and the court, by its order which recited that the subscription had been made, directed the issue of bonds in payment of the subscription to be issued to a company formed by a consolidation of the company to which the subscription was voted with another company, the agent, as directed by the order, making the subscription on the books of the new company, it was

**MUNICIPAL BONDS — IN GENERAL — continued.**

held that the bonds thus issued were not valid, the original order not being self-executing, and there being no subscription in the first instance. [CLIFFORD, SWAYNE, and STRONG, JJ., dissenting.] *Bates County v. Winters*, 97 U. S. 83.

22. It appearing, however, on a second trial, that the agent, at a meeting of the directors of the company, was present for the purpose of making the subscription and presented to the board a record of the proceedings of the county, which was spread upon the company's records, and the subscription was then accepted by the company, it was held that the county was bound as fully as though a formal subscription had been made, and that, the agent being present, no further notice to the county of the acceptance of the subscription was necessary. *Bates County v. Winters*, 112 U. S. 325.

23. Where a statute declares that if a majority of the legal voters of a town, voting at an election, shall be in favor of a subscription in aid of a railroad, it shall be deemed and held that the town has taken stock, such a vote is made equivalent to, and a substitute for, a subscription on the books of the railroad company. *East Lincoln v. Davenport*, 94 U. S. 801.

24. — *Who Proper Officials to issue.* Where an act authorizing a county to subscribe in aid of a railroad declared that a subscription should be deemed valid if made by a majority of the commissioners, and that two of them should be a board for the transaction of business, and, when regularly convened, should be competent to perform all or any of the duties of their office, it was held that bonds signed and issued by two of the three commissioners were valid. *Curtis v. Butler County*, 24 How. 435. And see *Woods v. Lawrence County*, 1 Black, 386.

25. After a vote by the electors of an Illinois township in favor of a donation to aid in the construction of a railroad, the supervisor and clerk of the township are the proper authorities to subscribe for the stock of the company and to issue the bonds of the township therefor. *Walnut v. Wade*, 103 U. S. 683.

26. Where the general statutes as well as the decisions of the court make county boards of supervisors the legal successors of the county courts, it cannot be contended that county bonds otherwise regularly issued are invalid because issued by the board of supervisors of a county organized under a statute devolving such a duty on the county court. *Kankakee County v. Aetna Life Insurance Co.*, 106 U. S. 668.

27. Where a New Jersey statute ratified the proceedings of a township in voting a bounty to volunteers, and authorized the township to issue bonds in payment of the bounty, payable at such times as the township committee might determine, it was held that although, in that state, a township committee has no general authority to act for the township, yet that, in view of its functions, it

**MUNICIPAL BONDS — IN GENERAL — continued.**

was the appropriate body to issue the bonds, and that bonds issued by it on behalf of the township were valid. *Middleton v. Mullica Township*, 112 U. S. 433.

28. Town bonds, the issue of which was duly authorized, and which, otherwise, were issued strictly in accordance with law, will not be deemed invalid in the hands of a *bona fide* holder for value because the person who signed the bonds as town clerk had ceased to be such at the date of his signature, the bonds having been delivered, afterwards, by the chairman of the board of supervisors. *Weyauwega v. Ayling*, 99 U. S. 112.

29. In Missouri, as in general, the acts of one exercising the duties of an office under color of right are valid, so far as the rights of third persons depend on their validity; as, for instance, in a suit by a *bona fide* holder for value of county bonds, it cannot be shown that the president of the county court who signed them was president *de facto* only and not *de jure*. *Ralls County v. Douglass*, 105 U. S. 728.

30. Where a statute provides that the board of county commissioners shall cause the bonds, the issue of which is authorized by a popular vote, "to be issued in the name of the township, to be signed by the chairman of the board, and attested by the clerk, under the seal of the county," the signature of the clerk is essential to the validity of the bonds, although the law gives him no discretion as to withholding his signature. *Bissell v. Spring Valley Township*, 110 U. S. 162.

31. If the board might cause his signature to be affixed without his assent, the fact that it was so affixed should appear. *Ib.*

32. — *Conditions — What constitute — Effect.* Bonds of a municipal corporation issued on a subscription to the stock of a railroad company, under an ordinance that the stock shall "remain forever pledged for the redemption" of the bonds, are an absolute obligation of the corporation, the ordinance creating only a pledge of the stock by way of collateral security for their payment. *United States v. New Orleans*, 98 U. S. 381.

33. Where an act authorizing a county to issue bonds in payment of stock in a railroad, to aid in its construction, provides that the company shall not sell the bonds at a discount, and the meaning of the provision as gathered from the whole act is merely that they shall not be credited to the county at less than par, a sale at a discount will not of itself avoid the bonds in the hands of a *bona fide* holder. *Woods v. Lawrence County*, 1 Black, 386.

34. *Semble* that if a municipality is forbidden by statute to dispose of bonds issued in aid of a railroad for less than their par value, one not a holder for value without notice cannot maintain against the municipality an action on bonds disposed of for less than par. *Queensbury v. Culver*, 19 Wal. 83.

**MUNICIPAL BONDS — IN GENERAL — continued.**

35. Where a statute authorizing a municipality to issue bonds in aid of a railroad empowers it to dispose of them to such persons or corporations as it "shall deem most advantageous for the town," but not for less than par, and requires it not to pay over any money or bonds to the railroad company until certain assurances shall be given, a delivery of bonds to the company is authorized. *Id.*

36. Under authority given to cities to aid railroad companies, "by loan or donation, with or without conditions," aid may be given on condition that the company shall have the terminus of its road in the city, or shall there connect with a certain other road, and on the further condition that if any citizen shall subscribe and pay for stock of the company it shall deliver to him the city's bonds, and that citizens shall have the right to subscribe to the extent of the amount of aid voted. *Taylor v. Ypsilanti*, 105 U. S. 60.

37. Where a statute required that bonds issued by a municipality in aid of internal improvements should be deposited with the state treasurer, to be held in escrow until the conditions of the subscription should be complied with, then to be delivered, and that the state auditor, on being satisfied that they had been regularly and legally issued, should so certify on them, but provided that the requirement of delivery to the treasurer should not apply where some other party was named as trustee, and bonds, instead of being deposited with the treasurer for delivery on compliance with certain conditions, were procured to be certified by the auditor and were then fraudulently issued, nothing on their face indicating that the subscription was conditional, it was held that an action on them might be maintained by a *bona fide* holder for value, as delivery to the treasurer not being required in all cases, the purchaser was not bound to knowledge that it was required in this, and had the right to rely on the auditor's certificate. *Lewis v. Barbour County Commissioners*, 105 U. S. 739.

38. Where a prerequisite to an election to determine whether municipal bonds in aid of a railroad shall be issued is that the entire line of the road shall be surveyed and substantially located and an estimate made of the cost, a final and definite survey and location is not essential, nor is an estimate of the quantity of the grading, embankment, and masonry. A general location and estimate will suffice. *Wilson County v. Nashville Third National Bank*, 103 U. S. 770.

39. — *Registration — Various Statutes — Construction.* Where a statute provides, as does the Missouri statute of March 30, 1872, that bonds afterwards issued by municipal corporations, to be valid, shall be registered, bonds issued after the passage of the statute, although in pursuance of a vote had before and falsely ante-dated by a justice of the court who became such after the apparent date of the bonds, are invalid, even

**MUNICIPAL BONDS — IN GENERAL — continued.**

in the hands of one having no knowledge of the facts, the defect being not an irregularity, but a want of power. [CLIFFORD, SWAYNE, and STRONG, JJ., dissenting.] *Anthony v. Jasper County*, 101 U. S. 693.

40. Bonds issued without registration after the passage of such a statute are invalid, although the subscription voted was made by the county court and accepted by the company before its passage; and this, notwithstanding a constitutional prohibition against laws retrospective in their operation or impairing the obligation of contracts. *Hoff v. Jasper County*, 110 U. S. 53.

41. The Missouri statute of March 30, 1872, providing for the registration of bonds issued by "any county, city, or incorporated town," applies to bonds issued by counties under the "township aid act" of March 23, 1868. Although such bonds are township bonds in the sense that they are payable from taxes levied on the property of the township voting them, they are issued by the county, which, in the matter, represents the township. *Anthony v. Jasper County*, 101 U. S. 693.

42. Where a statute declares that the holder of municipal bonds previously issued may have the benefits of registration by having them registered by the state auditor, who shall then notify the officers issuing them of the fact of registration, whereupon they shall record the fact, and the bonds shall thereafter be considered registered bonds, bonds do not become registered bonds on being registered by the auditor, the subsequent record being essential to complete registration. *Bissell v. Spring Valley Township*, 110 U. S. 162.

43. A statutory requirement that municipal bonds, before being issued, shall be registered by the state auditor, who shall certify on them that the conditions of the law and contract have been complied with, is not open to the objection that it delegates judicial functions to an executive officer. *Hoff v. Jasper County*, 110 U. S. 53.

44. — *Effect of Issue pending Litigation.* A purchaser for value, before maturity, of negotiable bonds issued by a county in aid of a railroad is not, in a suit against the county, precluded from a recovery, merely because the bonds were issued during the pendency of legal proceedings instituted to prevent their issue, he having no actual knowledge thereof. The rule that charges a purchaser of property with knowledge of a pending suit concerning its title is inapplicable to the case of negotiable securities purchased before maturity. *Warren County v. Marcy*, 97 U. S. 96; *Thompson v. Perrine*, 103 U. S. 806.

45. Nor is the case altered by the fact that the bonds were issued in violation of an injunction directed to the county officials, the bonds then being in the custody of a bank which was not made a party to the injunction suit, it not appearing under what circumstances they were delivered, and the plaintiff acquiring them as an innocent

**MUNICIPAL BONDS — IN GENERAL — continued.**

purchaser for value. *Cass County v. Gillett*, 100 U. S. 585.

46. A purchaser for value of bonds issued in violation of an injunction, he being no party to the injunction suit, having no actual knowledge of the litigation or of the grounds on which it proceeded, or of the fact that the injunction had been served on the officials who issued the bonds, and the litigation resulting finally in deciding that the grounds on which it was sought to restrain the issue were untenable, is not precluded from a recovery. *Carroll County v. Smith*, 111 U. S. 556.

47. So where a county judge, pursuant to statute, ordered bonds to be issued by commissioners appointed by him, and parties dissatisfied carried the proceedings by *certiorari* to the higher courts, where they were finally adjudged invalid, but, in the meanwhile, no injunction having been applied for, the commissioners issued the bonds, which showed no defect on their face, it was held that the municipality could not set up their invalidity in a suit by a *bona fide* holder for value before maturity. *Orleans v. Platt*, 99 U. S. 676; *Lyons v. Munson*, Id. 684.

48. One, however, who, with knowledge of the pending suit and of the fact that the bonds were issued in violation of an injunction, takes them, is bound by the judgment declaring them invalid. *Scotland County v. Hill*, 112 U. S. 183.

49. And it makes no difference that such judgment conflicts with a judgment of the supreme court in another case. It cannot thus be assailed collaterally. *Ib.*

50. Where commissioners appointed by a county judge to execute and issue bonds of a town, execute and deliver them to the railroad company for which they were intended, pending proceedings to review, on *certiorari*, the judgment of the county judge in the premises, and after the bonds are so delivered, the judgment is reversed, the bonds are void in the hands of the railroad company or of an assignee of the railroad having notice of the facts. *Stewart v. Lansing*, 104 U. S. 505.

51. — *Prerequisites, in general, to Validity of Subscription and Issue.*] The requirement of a statute authorizing the issue of municipal bonds, that the "inhabitants" shall approve the issue, is satisfied by the approval of a majority of the legal voters. *Walnut v. Wade*, 103 U. S. 683.

52. Where a statute authorizes the "inhabitants" of a township to approve the issue of bonds, and the bonds recite that they are issued pursuant to a vote of the "people," a substantial compliance with the requirement of the statute is shown. *Ib.*

53. Where a town has authority to subscribe to the capital stock of a railroad company "in any sum not exceeding" a certain amount, it may subscribe less sums from time to time, until

**MUNICIPAL BONDS — IN GENERAL — continued.**

the limit is reached. *Empire Township v. Darlington*, 101 U. S. 87.

54. A statute which, like the Arkansas statute of July 23, 1868, authorizes counties to subscribe "to the stock of any railroad," not exceeding a specified sum, does not restrict a county to a subscription to that amount in aid of one road, but only to a subscription to that amount<sup>4</sup> in case of any one road. *Chicot County v. Lewis*, 103 U. S. 164.

55. Where one section of a statute conferred on counties on the line of a railroad power to make subscriptions or donations in aid of the road, without limitation as to amount, and the following section of the same statute conferred on a certain county on the line of the road power to subscribe not exceeding a certain amount, it was held that the power to make a donation existed in addition to the power to subscribe the amount limited, and that, moreover, if this were not so, it not appearing, in a suit on the donation bonds by a *bona fide* holder for value, that the obligation of the county to pay its subscription bonds ante-dated its obligation to pay its donation bonds, a recovery should be had, and that, again, as the issue of donation bonds was authorized by the law referred to on their face, the purchaser was under no obligation to look farther into the question of authority to make the issue. *Moultrie County v. Fairfield*, 105 U. S. 370.

56. Where a statute authorizing the issue of municipal bonds expressly permits their issue in such denominations as may be agreed on by the officials of the county and of the railroad in aid of which they are given, it is immaterial that the bonds are of denominations other than those specified in the proposal made by the company to the electors and accepted by their vote. *Greene County v. Daniel*, 102 U. S. 187.

57. Under authority to a county to mortgage certain of its lands "to aid in the construction" of a railroad to be made therein, it is not necessary that the road be made before the mortgage. Such authority, on the contrary, contemplates that aid be given before the road is made, and that the county take the ordinary risk of the success of the undertaking. *Kenicott v. Wayne County Supervisors*, 16 Wal. 452.

58. A statute authorizing a city to subscribe for the stock of a railroad company, and to "issue bonds bearing interest, or otherwise to pledge the faith of said city . . . to pay for the same," authorizes the issue of instruments in form bonds, except in lacking a seal. *San Antonio v. Mehaffy*, 96 U. S. 312.

59. Where town commissioners are authorized by statute to execute and issue bonds "under their hands and seal" in payment of a subscription to railroad stock, the fact that the bonds issued are without a seal will not invalidate them in the hands of a *bona fide* holder for value. The pledge of credit is the principal thing, and the form of

**MUNICIPAL BONDS — IN GENERAL — continued.**

the obligation is matter rather of form than of substance. *Draper v. Springport*, 104 U. S. 501.

60. A municipality, when sued on its bonds by an innocent holder for value, may be enjoined from setting up the defence that the bonds, which should have been sealed, were not sealed. *Bernards Township v. Stebbins*, 109 U. S. 341.

61. The provision of the charter of the Rockford, Rock Island, and St. Louis Railroad Company prescribing a notice of thirty days by publication as a prerequisite to the election required concerning subscriptions by municipalities to the stock of the company was not abrogated by the Illinois statute of March 25, 1869, authorizing certain counties to subscribe to the stock of railroad companies, and providing that the question should be submitted in such manner as the county authorities might determine. *Warren County v. Marcy*, 97 U. S. 96.

62. The Kansas statute of February 10, 1865, as amended February 26, 1866, authorizing the issue by counties and cities of bonds in aid of railroads was not repealed, either expressly or by implication, by the general statutes of 1868. *Block v. Bourbon County Commissioners*, 99 U. S. 686.

63. The Missouri statute of January 14, 1860, amending the general railroad law and requiring an election as a condition precedent to the subscription by municipalities to the stock of railroad companies, has no application to subscriptions to the stock of companies having special charters, in which special power was given to municipalities to subscribe. *Schuyler County v. Thomas*, 93 U. S. 169; *Cass County v. Gillett*, 100 U. S. 535.

64. The Wisconsin statute of March 8, 1867, and the statutes amendatory thereof, authorizing the issue of county bonds in aid of the Green Bay and Lake Pepin Railway, were not repealed by the statute of March 8, 1870, the earlier act, with its amendments, relating to that company, the later act applying to any company which should construct its road to either of two certain points. The scope of the statutes is different, and there is no repugnancy between them. *Wood County Supervisors v. Lackawanna Iron & Coal Co.*, 93 U. S. 619.

65. Where, had the returns from a certain township been received and counted, it would have appeared that a majority of the electors of a county were opposed to the issue of bonds, and the returns received were canvassed, and declared, on the minutes of the commissioners, to show the result of the vote to be in favor of the issue of the bonds, which accordingly were issued, the rights of a *bona fide* purchaser of the bonds for value were held unaffected by the fact that after the bonds were issued a new canvass was made by another board, and a contrary result announced as the result of the election. *Block v. Bourbon County Commissioners*, 99 U. S. 686.

**MUNICIPAL BONDS — IN GENERAL — continued.**

66. Section 5 of the Illinois statute of March 6, 1867, authorizing the issue of municipal bonds in aid of railroad companies, declares that "no mistake in the giving of the notice, or in the canvass or return of votes, or in the issuing of the bonds, shall in any way invalidate the bonds so issued, — provided that there is a majority of the voters at such election in favor of such subscription." An election was called on an application signed by a less number of taxpayers than the number required by the statute, ten days' notice only, instead of twenty, as required, being given. A majority voted in favor of a subscription, and bonds were issued accordingly. In a suit on the bonds by a *bona fide* holder for value before maturity, it was held that the provision of that section of the statute was not unconstitutional, the state constitution prohibiting enactments compelling or requiring the corporate authorities to subscribe to the stock of railroad companies, but permitting enactments authorizing such subscriptions without submitting the question to the popular vote. *Roberts v. Bolles*, 101 U. S. 119.

67. Where a statute authorizing the issue of bonds provides that it shall take effect only after its publication in a certain newspaper, and that no bonds shall be issued until the question of their issue shall have been voted after thirty days' notice, bonds which on their face refer to the statute charge the purchaser with notice of the requirement of publication, and the date of the vote recited on the bonds being within thirty days of the time of publication, the bonds are invalid, as are detached coupons which refer to them, even in the hands of one claiming to be a *bona fide* holder for value. *McClure v. Oxford Township*, 94 U. S. 429.

68. Where a statute provides that the question of subscribing to the stock of a railroad company may be submitted to the voters of a county, and that, if the county commissioners shall not be authorized to subscribe on behalf of the county, "then, and in that case," the question of subscription by township trustees shall be submitted to the people of the respective townships, a subscription and a consequent issue of bonds by a township is invalid, if, before the township election was called, a county election had been held, and a county subscription authorized and made. *Toledo Northern Bank v. Porter Township Trustees*, 110 U. S. 608.

69. Nor, in such case, is the township, when sued on the bonds by a *bona fide* holder for value, precluded from relying on the want of authority, notwithstanding recitals in the bonds. Recitals cannot cure a want of legislative authority. *Ib.*

70. The charter of Louisiana, Missouri, when construed in connection with the state constitution, cannot be deemed to authorize that city to subscribe to the capital stock of an Illinois railroad corporation. Nor can the power be found in Mo. Gen. Sts. 1865, c. 63, § 17, as amended

**MUNICIPAL BONDS — IN GENERAL — continued.**

March 24, 1870. *Allen v. Louisiana*, 103 U. S. 80.

71. — *Immaterial Irregularities — What are.* An Iowa county judge is not so far superseded in his office in his absence from the state that he may not, while absent, perform the ministerial act of executing and issuing bonds of the county, although the code provide that in his absence the county clerk "shall supply his place." [CHASE, C. J., and MILLER and FIELD, JJ., dissenting.] *Lynde v. Winnebago County*, 16 Wal. 6.

72. A statute authorizing "the county court" of a certain county to issue the bonds of the county, and to mortgage certain lands as security for payment, in aid of the construction of a railroad, may be executed by a mortgage executed by the judges of the court alone. The signature of the clerk is not necessary. *Kenicott v. Wayne County Supervisors*, 16 Wal. 452.

73. Municipal bonds issued in aid of a railroad company are not invalid by reason of the fact that the subscription was voted on the day on which the company was incorporated. *Cass County v. Johnston*, 95 U. S. 360.

74. A municipal bond, on the back of which is indorsed the certificate of the auditor of the state that it has been duly registered in his office according to law, is not invalid because he failed to make in his office an entry of his action. *Rock Creek Township v. Strong*, 96 U. S. 271.

75. Where a statute authorizes the issue of municipal bonds, payable in not more than thirty years from their date, bonds made payable thirty years from a day a month later than the day on which they are dated, are issued in substantial compliance with the statute, although it does not appear when they were delivered. *Id.*

76. Where a statute which, like the Kansas statute of February 10, 1865, authorizing municipal corporations to subscribe for the stock of railroad companies and to issue bonds therefor, permits such subscription and issue if, before the passage of the act, a popular vote authorized the issue, bonds which recite that they were issued under the provisions of the statute are valid, their issue having been authorized by a vote taken before its passage. *Leavenworth County v. Barnes*, 94 U. S. 70.

77. Under a statute authorizing the issue of county bonds in aid of a railroad, if the voters shall so decide, the fact that at one election the voters reject the proposition does not preclude its submission a second time, there being nothing in the statute so providing. *Calhoun County Supervisors v. Galbraith*, 99 U. S. 214.

78. Where a statute directed county bonds issued in aid of a railroad to be made payable to the president and directors and their successors and assigns, and the bonds as issued were made payable to the company or bearer, it was held that this departure from the prescribed form was

**MUNICIPAL BONDS — IN GENERAL — continued.**

immaterial, the direction being merely directory, and the defect one of form, not of substance. *Id.*

79. Where the written assent of taxpayers to a subscription to the stock of a railroad company conforms to the description of the company given in the statute authorizing the subscription, and to the description of the company afterwards organized, bonds issued by the municipality in payment of the subscription are not invalid because the company was not named in the assent. *Scipio v. Wright*, 101 U. S. 665.

80. Under a statute requiring, as a prerequisite to a subscription by a municipality in aid of a railroad, the written assent of two thirds of the resident taxpayers, as appearing in the assessment roll made next previous to the time of borrowing the money to pay the subscription, bonds issued in payment thereof are not void because not issued until after the completion of the next assessment roll. *Id.*

81. Bonds issued in aid of a railroad company may be valid although in the petition for and notice of the election authorizing the issue the name of the company was wrongly stated, there being no doubt of the identity of the company. *Moultrie County v. Fairfield*, 105 U. S. 370.

82. Nothing in the Michigan statute of March 22, 1869, relating to the issue of bonds by townships in aid of railroads, deprives the township authorities of the right to execute and deliver them after the expiration of sixty days from the time of the vote authorizing their issue. The requirement that they shall be issued in sixty days does not have the effect of preventing their issue afterwards. *Chickaming v. Carpenter*, 106 U. S. 663.

83. An irregularity in the exercise of an express power to issue municipal bonds, such as a want of proper notice of the election, no attempt having been made to enjoin their use during the two and one half years while they were in the hands of the railroad company for whose benefit they were issued, and interest having been paid on them for ten years, cannot be set up in an action by a *bona fide* holder of them for value. *Anderson County Commissioners v. Beal*, 113 U. S. 227.

84. — *Liability of County on Township and Precinct Bonds.* On bonds issued by a county court in the name of a county, under the Missouri township aid act of March 23, 1868, although the issue is in behalf of a township, an action may be maintained in the federal court against the county. A township in that state, having no corporate existence, acts through the county which represents it. *Cass County v. Johnston*, 95 U. S. 360.

85. So may a county be sued on bonds issued in aid of works of internal improvement under the Nebraska statute of February 15, 1869, requiring county commissioners to issue special bonds for a precinct in pursuance of a popular

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vote of the precinct, and providing that the tax to pay the bonds shall be levied on property within the precinct, a precinct, in that state, having no corporate existence, and being but a political subdivision of a county. *Davenport v. Dodge County*, 105 U. S. 237; *Blair v. Cumming County*, 111 U. S. 363.

86. Bonds so issued under the Nebraska statute are properly attested by the chairman and clerk of the board of county commissioners. It is not necessary that all the commissioners should sign the bonds. *Blair v. Cumming County*, 111 U. S. 363.

87. As that statute, as amended by the statute of March 3, 1870, requires the levy of a tax to pay interest on bonds so issued, and as the provisions of the earlier statute limiting the amount of the tax which may be levied are repealed by the later statute, which also provides that the county officers may be compelled, by mandamus, to make the levy, one who has obtained against the county a judgment for interest due on bonds so issued is entitled to a writ of mandamus to compel the levy of a tax to pay the judgment. *United States v. Dodge County Commissioners*, 110 U. S. 156.

88. — *Recitals in Bonds — Effect by Way of Estoppel and otherwise.* Where a statute authorizing the issue of municipal bonds provides that the officers issuing them be authorized by a popular vote, it is for them to decide whether such vote has been lawfully taken; and their decision cannot be called in question collaterally in a suit on bonds brought by an innocent purchaser for value, the bonds being negotiable, although it might not be conclusive in a direct proceeding to inquire into the facts brought before the rights of third parties had attached. [DANIEL, J., dissenting.] *Knox County Commissioners v. Aspinwall*, 21 How. 539; *Knox County Commissioners v. Wallace*, Id. 546.

89. Where, under legislative authority, a municipal council ratified a subscription for stock in a railroad company, and in ratifying the contract recited that it was based on a petition signed by the requisite number of voters, and issued bonds containing a like recital, the corporation was estopped, in an action on the bonds or the coupons thereof by a *bona fide* purchaser for value, to deny that the requisite number of voters had signed the petition. *Bissell v. Jeffersonville*, 24 How. 287. And see *Van Hostrup v. Madison*, 1 Wal. 291; *Rogers v. Burlington*, 3 Wal. 654; *Marshall County Supervisors v. Schenck*, 5 Wal. 772.

90. The law not providing any tribunal to determine whether the requisite number of voters had petitioned, the power vested in the council. *Id.*

91. If bonds issued by a municipal corporation specially authorized by statute to borrow money and issue bonds therefor, recite facts

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showing that they were regularly issued in pursuance of the statute, the corporation is estopped in an action thereon by a *bona fide* holder for value to deny that they were so issued. *Moran v. Miami County Commissioners*, 2 Black, 722; *Mercer County v. Hackett*, 1 Wal. 83; *Van Hostrup v. Madison*, 1 Wal. 291; *Meyer v. Muscatine*, 1 Wal. 384.

92. Where an Iowa county judge, an officer charged by the code with the duty of providing for the erection of county buildings, and, on the authority of a popular vote, of borrowing money to pay for them, executes and issues county bonds setting forth that such authority has been given, the county is estopped to assert their invalidity for want of such authority in the hands of a *bona fide* holder for value; the judge being the officer designated by the code to decide whether the authority has been given. [CHASE, C. J., and MILLER and FIELD, JJ., dissenting, holding that the judge is a mere agent having a limited authority and no power to conclude the county by a recital of an authority not conferred.] *Lynde v. Winnebago County*, 16 Wal. 6.

93. Where, by statute, authority has been given to a municipality or its officers to subscribe for stock in a railroad company, and to issue bonds in payment, but only on some precedent condition, *e. g.*, a popular vote favoring the subscription, and where it may be gathered from the statute that the officers were invested with power to decide whether the condition had been complied with, a recital that it had been, in the bonds issued by them and held by a *bona fide* purchaser, is conclusive and binding on the municipality, the recital being itself a decision by the appointed tribunal. *Coloma v. Eaves*, 92 U. S. 484 [MILLER, DAVIS, and FIELD, JJ., dissenting]; *Douglas County Commissioners v. Bolles*, 94 U. S. 104; *Marion County Commissioners v. Clark*, 94 U. S. 278; *Henry County v. Nicolay*, 95 U. S. 619; *Rock Creek Township v. Strong*, 96 U. S. 271; *San Antonio v. Mehaffy*, 96 U. S. 312; *Warren County v. Marcy*, 97 U. S. 96; *Nauvoo v. Ritter*, 97 U. S. 389; *Calhoun County Supervisors v. Galbraith*, 99 U. S. 214; *Orleans v. Platt*, 99 U. S. 676; *Lyons v. Munson*, 99 U. S. 684; *Walnut v. Wade*, 103 U. S. 683; *Clay County v. Society for Savings*, 104 U. S. 579; *Sherman County v. Simons*, 109 U. S. 735; *Grenada County Supervisors v. Brogden*, 112 U. S. 261. And see *St. Joseph Township v. Rogers*, 16 Wal. 644.

94. So where the statute requires the written assent of two thirds of the resident taxpayers whose names were on the last assessment roll, and creates as a tribunal to determine whether the requisite number has assented, the municipal officers who are empowered to execute the bonds in case the assent is given. [MILLER, DAVIS, and FIELD, JJ., dissenting.] *Venice v. Murdock*, 92 U. S. 494; *Genoa v. Woodruff*, Id. 502.

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95. And where the bonds contain a recital that they are issued in pursuance of a subscription made in conformity to the statute, it cannot be contended, in a suit on them by a *bona fide* purchaser, that, when the subscription was made, the time for making it had expired, nothing on the records of the municipality showing this, and it being a matter, not of law, but of fact. [MILLER, DAVIS, and FIELD, JJ., dissenting.] *Moultrie County v. Rockingham County Ten Cent Savings Bank*, 92 U. S. 631.

96. And the recital being that the bonds are executed and issued in accordance with the statute, and in pursuance of the vote of three fifths of the voters, and the bonds being signed by the chairman of the municipal board, attested by the clerk, sealed with the corporate seal, registered in the office of the state auditor, and certified by him, in accordance with the statute, to have been regularly and legally issued, and it being apparent from the statute that the board was empowered to determine whether the facts existed which, under the law, warranted the issue of the bonds, it cannot be set up, in a suit on the bonds by a *bona fide* purchaser, that at the time of their issue the taxable property of the municipality was not sufficient in amount to authorize the issue of the series of which the bonds sued on are a part. [MILLER, DAVIS, and FIELD, JJ., dissenting.] *Marcy v. Oswego Township*, 92 U. S. 637; *Humboldt Township v. Long*, Id. 642; *Wilson v. Salamanca*, 99 U. S. 499; *Dallas County v. McKenzie*, 110 U. S. 686.

97. And although the popular election was held within a less time after notice than the statute required, the election not in itself conferring power to issue the bonds, but being one step in the execution of the power, the recital of the board that the bonds were issued in accordance with the law, binds the municipality in such suit. [MILLER, DAVIS, and FIELD, JJ., dissenting.] *Humboldt Township v. Long*, 92 U. S. 642.

98. And the bonds reciting that they were issued in conformity to law, and the municipality having taken and held the certificates of stock given for them, and having paid interest on them, it cannot contend, when sued by a *bona fide* holder for value, that there was no valid order submitting the question of their issue to a popular vote. *Johnson County Commissioners v. January*, 94 U. S. 202.

99. Nor that there was a misrecital of the statute authorizing their issue. *Id.*

100. Nor that the company in aid of which they were issued was not created according to law until after the vote authorizing the subscription was taken. *Daviess County v. Huidekoper*, 98 U. S. 98.

101. So where the statute authorized the issue of bonds by townships along the route of a certain road or at its termini, and a township issued bonds on the supposition that it was to be the

**MUNICIPAL BONDS — IN GENERAL — continued.**

terminus of the projected road, and by a change of plan after the issue it became a township along the route of the road, the change being a beneficial one, the township having recognized the validity of the bonds by payments of interest, and the legislature, since the issue, having recognized its validity, it was held that the township could not contest the right of a *bona fide* holder of the bonds for value before maturity, to recover on them. [FIELD and BRADLEY, JJ., dissenting.] *Pompton v. Cooper Union*, 101 U. S. 196.

102. And where the statute, while authorizing the unconditional issue of bonds, confers the right to impose conditions, and declares that, if conditions are imposed, the bonds shall not be valid until the conditions are complied with, and notwithstanding the imposition, by popular vote of conditions, bonds are issued containing recitals giving no intimation of any conditions, but, in effect, representing the issue to be in conformity with the law, the municipality cannot escape liability on the bonds at the suit of a *bona fide* holder for value. *Insurance Co. v. Bruce*, 105 U. S. 328.

103. Although the township records contain no evidence of a meeting whereat the qualified voters assented to the issue of bonds, the recital in the bonds that they were issued in pursuance of statutes authorizing them is conclusive on the township in a suit brought against it by a *bona fide* holder. *Bonham v. Needles*, 103 U. S. 648.

104. The circumstance that an election was irregularly conducted—as, for instance, that it was presided over, and that the returns were made, not by those who, by their office, were judges of elections, but by a moderator chosen by the electors present—cannot avail the municipality, when sued on its bonds by a *bona fide* holder for value, the bonds reciting a compliance with the law governing their issue. *Pana v. Bowler*, 107 U. S. 529.

105. Where municipal bonds recite that they are issued pursuant to a statute which has been, in fact, repealed by a statute conferring authority to make the issue, and the repealed statute requires twenty days' notice of the election and the repealing statute thirty days, and the commissioners whose duty it is to ascertain if the requirements of the law have been observed so certify, it will not be presumed, as against a *bona fide* holder for value, that less than thirty days' notice of the election was given. *Anderson County Commissioners v. Beal*, 113 U. S. 227.

106. But the recitals, to bind the municipality, must be unambiguous; for instance, a recital that the issue is by authority of an election held in conformity with the statute regulating the subject does not import a compliance with a provision of the statute which, following the state constitution, prohibits the incurring of an indebtedness exceeding a certain percentage of the valuation of the taxable property of the munici-



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pality, as shown by the last state and county tax lists. *Independent School District v. Stone*, 106 U. S. 183.

107. And where the recitals merely state that the issue is authorized by a statute, the title and date of which are given, the municipality is not precluded from showing that the issue was not authorized by the vote required by the state constitution. *Carroll County v. Smith*, 111 U. S. 556.

108. And the recital, to bind the municipality, must be of facts to decide which, the officials making it and issuing the bonds are the appointed tribunal,—must be the official statements of those to whom the law refers the public for authentic and final information. Where, for instance, a county has power to issue bonds only within the limit of a certain percentage of the amount of the assessed value of the taxable property of the county, this amount being ascertainable from an inspection of the public records, and its determination not being submitted to the officials issuing the bonds, their recital on the bonds that they were issued according to law, the recital also specifying the amount of the whole issue, does not bind the county, even in a suit by a *bona fide* holder for value. *Dixon County v. Field*, 111 U. S. 83.

109. A *bona fide* holder for value before maturity of municipal bonds issued in aid of a railroad is not chargeable with knowledge of special conditions on the fulfilment of which only the bonds were deliverable, if the conditions were not imposed by the statute, nor recited in the bonds; as, for instance, that the road should be completed before the bonds should be delivered. *Brooklyn v. Aetna Life Insurance Co.*, 99 U. S. 362.

110. Nor, the bonds having been signed by the officials designated by the statute, can it be objected that other corporate authorities did not participate in their issue and delivery. *Id.*

111. Where a bond issued by a municipal corporation in aid of a railroad recites that it "shall be valid only when it is thereon duly certified that the conditions upon which it was voted, issued, and deposited by said town have been performed," a certificate which contains the necessary recitals, and, in effect, declares that the conditions have been performed, a *bona fide* purchaser for value may maintain a suit on the bond, without regard to any question of the meaning of the conditions, or of whether the facts were as certified. *Menasha v. Hazard*, 102 U. S. 81.

112. Where a township, in pursuance of authority conferred by statute, votes a donation in aid of a railroad, to be met by a special tax, and subsequent legislation authorizes the issue of bonds in lieu of the tax, and another vote authorizes the issue, and the recitals in the bonds import a compliance with all of the provisions of

**MUNICIPAL BONDS — IN GENERAL — continued.**

the statutes under which the issue was made, although the second election is not in express terms referred to, the township cannot, in an action by a *bona fide* holder for value, dispute its liability on the bonds. *Harter v. Kernochan*, 103 U. S. 562; *Bonham v. Needles*, *Id.* 648; *Pana v. Bowler*, 107 U. S. 529.

113. — *Ratification by Municipality — What constitutes.* Municipal bonds irregularly issued, *e. g.*, in virtue of a popular vote ordered by the wrong authority, are validated in the hands of a *bona fide* holder for value by the levying of a tax to pay, and the paying of, interest thereon by the proper authorities, the vote and other proceedings having been in all other respects regular. *Marshall County Supervisors v. Schenck*, 5 Wal. 772.

114. The levying of taxes to pay interest and the payment of interest for nine years cures irregularities in their issue when set up in the suit of a *bona fide* holder for value. *Clay County v. Society for Savings*, 104 U. S. 579.

115. The issue of bonds in payment of the subscription of a county to the stock of a railroad company will not be declared invalid by the supreme court on the ground that the vote did not authorize the subscription, because taken under an order of court submitting, as a single proposition, the question of subscribing a certain sum to the stock of three separate companies, this ground not having been taken by the county in either of three cases in the supreme court of the state when the validity of the subscription was involved, the county, for fifteen years, not having disputed its validity, a subsequent statute having declared the vote to have been legally taken, and the supreme court of the state having recognized this statute as legalizing the vote of the county. *Morgan County v. Allen*, 103 U. S. 498.

116. There having been a total want of power to issue municipal bonds, and not a mere failure to comply with certain requirements or conditions, the payment of interest does not estop the municipality from contesting the validity of the bonds, nor does the conduct of agents or officers of the municipality in connection with the transaction. *Parkersburg v. Brown*, 106 U. S. 487.

117. Bonds void because issued to a railroad company other than that to which the popular vote authorized their issue, cannot be made valid by an attempted ratification on the part of the supervisors who issued them. *Marsh v. Fulton County*, 10 Wal. 676.

118. — *Ratification by Legislature — Power — Effect.* Unless restrained by the organic law, the legislature may ratify the act of a city which, without authority, has voted a subscription to the stock of a railroad company, and may authorize an issue of bonds in payment of the subscription. *Jonesboro v. Cairo & St. Louis Railroad Co.*, 110 U. S. 192. And see *Grenada County Supervisors v. Brogden*, 112 U. S. 261.

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119. Where a statute seeks, as it may do, there being no constitutional prohibition, to cure irregularities in the issue of bonds, a defect in the notice of the submission of the question of the issue to the popular vote is cured, as is an omission to include in the vote the question of taxation. *Otoe County v. Baldwin*, 111 U. S. 1.

120. Where municipalities, authorized to sell their bonds and pay the proceeds to railroad companies, illegally exchange them for stock instead, a statute which, like the New York statute of April 28, 1871, assumes to legalize exchanges which have been thus made, is a valid exercise of legislative power. *Thompson v. Perrine*, 103 U. S. 806; *Thompson v. Perrine*, 106 U. S. 589.

121. Where a city borrowed money for school purposes and issued bonds, in the absence of authority so to do, it was held that a statute legalizing the issue was not invalid as a special act conferring corporate powers, for the reason that, as the city would have been bound, notwithstanding the invalidity of the bonds, to repay the money received, no new obligation was in fact created. *Read v. Plattsburgh*, 107 U. S. 568.

122. So a statute authorizing certain counties to issue bonds for the purpose of funding the county warrants and orders is, for the same reason, valid. *Sherman County v. Simons*, 109 U. S. 735.

123. If a municipal corporation make a subscription in aid of the construction of a railroad, professedly under a statute authorizing a subscription for any amount and for that reason unconstitutional, but subscribe only so much as under another statute it might have subscribed lawfully, a subsequent legislative recognition of the legality of the subscription will give it validity. *Campbell v. Kenosha*, 5 Wal. 194.

124. Such recognition may be implied from a statute providing for an officer to look after the interests of the corporation in the road, and to redeem all scrip issued under the subscription. *Ib.*

125. A statute creating a city by carving it out of territory before comprised in a town, which enacts that all bonds previously issued by the town shall be paid by town and city in the same proportions as if they were not separated, amounts to a ratification of bonds outstanding, and cures all irregularities and defects of power, if any, in their issue, ratification being equivalent to original authority. *Beloit v. Morgan*, 7 Wal. 619.

126. Where the common council of a municipal corporation, assuming that it had authority, on petition of a certain number of voters so to do, and having determined that a petition signed by the requisite number had been presented, resolved to subscribe for stock in a railroad company and to issue municipal bonds in payment therefor, but before the bonds were issued the state court decided that there was a want of

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authority, it was competent for the legislature to authorize the council to ratify its former act; and on ratification the act became as valid as though there had been authority at the outset. *Bissell v. Jeffersonville*, 24 How. 287.

127. Bonds for a specific amount, issued by a city, invalid because the statute which authorized the city to contract the debt did not limit the amount, are made valid by a subsequent statute recognizing the validity of the debt as contracted. *Kenosha v. Lamson*, 9 Wal. 477.

128. The issue of municipal bonds representing a claim for work done in the interest of the municipality, but invalid because the ordinance which created the debt omitted to provide means for its payment, as required by statute, may be legalized by a subsequent statute; a constitutional restriction against the enactment of retroactive laws has no application. *New Orleans v. Clark*, 95 U. S. 644.

129. Where the corporate authorities of a city, in accordance with a popular vote, issued bonds of the city in aid of a railroad, no provision of law authorizing either the election or the issue, but a subsequent statute assuming to validate both, it was held, in an action by a *bona fide* holder for value of the bonds, that they were the valid obligations of the city. *Quincy v. Cooke*, 107 U. S. 549.

130. Where a county had issued bonds in payment of expenses incurred in opening and repairing roads, etc., and the bonds were void because, owing to an ambiguity in the language of the statute authorizing their issue, the question of the expenditures had not been submitted to the popular vote, it was held that a subsequent statute authorizing the issue of bonds in payment of expenditures thus already incurred was a proper exercise of legislative power, there being nothing in the state constitution prohibiting the legislature from empowering counties to borrow money to improve roads without the consent of the voters being asked. *Rüchle v. Franklin County*, 22 Wal. 67.

131. Such a statute is not within a constitutional prohibition against the passage of retrospective laws. *Ib.*

132. A statute which, like the Kansas curative statute of February 25, 1868, declares that counties may subscribe to the stock of railroad companies and issue bonds, when a majority of the voters have voted for the subscription, whether the orders and elections have complied with the statutes or not, and further declares that it shall apply to all cases where elections were held prior to a certain date, makes valid bonds issued after such date in pursuance of an election held before. *Johnson County Commissioners v. Thayer*, 94 U. S. 631.

133. Where a state constitution prohibits the legislature from authorizing any municipality to become a stockholder in, or to lend its credit to,

**MUNICIPAL BONDS — IN GENERAL — continued.**

any corporation, etc., unless two thirds of the voters shall assent, and, without previous legislative authority, a city subscribes for stock in a railroad corporation, under the authority of an election at which two thirds of the voters favor the subscription, such subscription is not made valid by a statute ratifying all subscriptions not made in violation of the constitution. The subscription, having been made without previous legislative authority, was made in violation of the constitution. *Hayes v. Holly Springs*, 114 U. S. 120.

134. — *Purchaser for Value — Who protected as such.* A purchaser of municipal bonds is chargeable with knowledge of a want of authority for their issue. The doctrine of *bona fide* purchaser for value cannot be invoked in an action on bonds thus issued. *Knox County Commissioners v. Aspinwall*, 21 How. 539; *Knox County Commissioners v. Wallace*, Id. 546; *Marsh v. Fulton County*, 10 Wal. 676; *East Oakland Township v. Skinner*, 94 U. S. 255; *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Kendall County Supervisors*, 105 U. S. 667; *Lewis v. Shreveport*, 108 U. S. 282; *Hayes v. Holly Springs*, 114 U. S. 120.

135. Where the recitals of municipal bonds show that the law governing their issue has not been complied with, the doctrine of a *bona fide* purchaser for value cannot be invoked. *Harshman v. Bates County*, 93 U. S. 569; *McClure v. Oxford Township*, 94 U. S. 429; *Bates County v. Winters*, 97 U. S. 83.

136. Where, by statute, the signature of a certain official is made essential to the validity of a municipal bond, the doctrine of *bona fide* holder for value cannot be invoked in an action on bonds issued without such signature. *Bissell v. Spring Valley Township*, 110 U. S. 162.

137. — *Modification of Contract.* Where a municipal corporation is by statute empowered to subscribe for stock in a railroad company, the power must be strictly pursued; and an agreement between the corporate authorities and the company, altering or modifying a subscription made in pursuance of the power, will be void. *Bell v. Mobile & Ohio Railroad Co.*, 4 Wal. 599.

138. Where a city subscribes to the capital stock of a railroad company, and issues bonds for payment of its subscription, agreeing to issue them for the residue on completion of the road, and the company, having pledged a part of the bonds so issued, as security for the payment of a debt, becomes insolvent and unable to complete its road, the right of the city to issue its bonds being contested, and the bonds, which are chiefly relied on by the company for means to proceed, being thereby greatly depreciated, so that all the bonds issued would not more than pay the debt so secured, the company may lawfully agree, acting in good faith and for the apparent interest of both parties, to cancel the subscription and sur-

**MUNICIPAL BONDS — IN GENERAL — continued.**

render the bonds on payment by the city of such debt and an additional sum, just as it might sell the bonds to provide means to that end; and other creditors cannot maintain a bill to set aside such a compromise, although it subsequently appear that the bonds surrendered were of greater value than was at the time supposed, — certainly not after a delay of more than nine years with knowledge, or the means of knowledge, of the compromise so made. *New Albany v. Burke*, 11 Wal. 96.

139. Where a county has issued its bonds in payment of a subscription to the stock of a railroad corporation, the county cannot afterwards, on the corporation becoming insolvent, make an arrangement under which, by a payment of less than the value of the bonds, other creditors of the corporation shall be deprived of the right to make the bonds available as assets of the corporation for the payment of its creditors generally. *Morgan County v. Allen*, 103 U. S. 498.

140. — *Defences to Actions on Bonds — What constitutes a Defence.* A municipal corporation authorized to subscribe to the capital stock of a railroad company, and to issue its bonds in payment therefor on some precedent condition, as, for instance, a vote of property holders, is estopped to deny the validity of its bonds, in the hands of an innocent purchaser, on the ground that the condition was not complied with where it took in exchange for the bonds a certificate of stock in the company and held it for years without disclaimer, and still holds it. *Pendleton County v. Amy*, 13 Wal. 297. And see *Lexington v. Buller*, 14 Wal. 282.

141. If a county in fact deliver its bonds to a railroad company, although in reliance on the assurance of its president that the bonds shall be used only in payment for work done on the road in that county, receive a certificate of subscription, and for two years pay interest on the bonds, the bonds must be deemed the property of the company and not of the county, and, as such, assets of the company of which its creditors may avail themselves on its insolvency. *Morgan County v. Allen*, 103 U. S. 498.

142. In an action on municipal bonds, the corporation, having had a sufficiently comprehensive authority to issue them, cannot show a want of compliance on its part with formalities prescribed by the statute authorizing the issue, or fraud by its agents in making it, as against a *bona fide* holder who took them before their maturity. *Grand Chute v. Winegar*, 15 Wal. 355.

143. Where a municipality has been invested by statute with authority to issue its bonds in aid of the construction of a railroad, and bonds have been issued accordingly, and the railroad built, the municipality cannot escape liability on the ground that its act was against public policy and without consideration. *Winona v. Cowdrey*, 93 U. S. 612.

MUNICIPAL BONDS — IN GENERAL — *continued.*

144. A purchaser of negotiable securities before their maturity, whatever may have been their original infirmity, can, unless he is personally chargeable with fraud in procuring them, recover against the maker the full amount of them, though he may have paid therefor less than their par value. *Cromwell v. Sac County*, 96 U. S. 51.

145. As against a *bona fide* holder for value of railroad bonds regular in form and executed by the proper officers, either the company or a purchaser of the road at an execution sale is estopped to assert that the mortgage given to secure them was executed, or was executed by virtue of a resolution of directors passed at a meeting held in a state other than that in which the company has its existence. *Galveston, Houston, & Henderson Railroad Co. v. Coudrey*, 11 Wal. 459.

146. Where bonds have been given by a county to a railroad corporation, the county, when sued on them by a *bona fide* holder for value, cannot deny the ability of the corporation to take the bonds, the corporation being a corporation *de facto*, if not *de jure*. *Douglas County Commissioners v. Bolles*, 94 U. S. 104.

147. A county, when thus sued, cannot contend that the corporation had not been organized within the time prescribed by its charter, it having been a corporation *de facto*. *Macon County v. Shores*, 97 U. S. 272; *Ralls County v. Douglass*, 105 U. S. 728.

148. In a suit by a *bona fide* holder for value of municipal bonds, evidence of fraud and irregularity touching their issue, but antecedent to it, is inadmissible. *Macon County v. Shores*, 97 U. S. 272.

149. Where municipal authorities, acting within their powers, have issued bonds of the municipality to a railroad company in aid thereof, and the company has effected a consolidation with another company according to an agreement made with the municipality in consideration of the issue of the bonds, the municipality, in a suit on the bonds by a *bona fide* holder for value, is estopped to dispute their validity on the ground that the issue was in pursuance of a corrupt bargain to which the authorities who issued the bonds were parties. *Tipton County v. Rogers Locomotive & Machine Works*, 103 U. S. 523.

150. A holder of municipal bonds issued in aid of a railroad is not precluded from maintaining an action on the bonds or coupons by reason of the fact that the statute authorizing their issue made it the duty of a municipal board to collect by levy the amount necessary for their payment, and to pay them. *Queensbury v. Culver*, 19 Wal. 83.

151. A municipal corporation may waive conditions inserted in a contract for its benefit, but found to be injurious to its interests, and may estop itself like other parties to a contract; thus, where it has subscribed for stock of a railroad company on condition that the road shall be com-

MUNICIPAL BONDS — IN GENERAL — *continued.*

pleted on a certain date, it may extend the time, and if it accept the stock and issue its bonds declaring the road completed to its satisfaction, it cannot afterwards object that the road was not completed within the time originally agreed. *Randolph County v. Post*, 93 U. S. 502.

152. Where a county court, assuming that interest in arrears on bonds issued under the Missouri "township aid act" was a county debt, ordered the issue of "county funding-bonds," under the authority of the Missouri statute of March 24, 1868, authorizing counties, etc., to fund their debts, the order reciting that the funding bonds were issued "for the purpose of paying said coupons, keeping the faith of the county," etc., it was held that the county was estopped from denying its liability on the bonds in the hands of a *bona fide* holder for value. *Cass County v. Shores*, 95 U. S. 375.

153. A city which, in payment of its indebtedness, has issued bonds engraved on bank-note paper and resembling bank-bills, and afterwards, under a power given it to issue bonds to pay its debts, has redeemed the bonds first issued, cannot, when sued on bonds of the last issue, contend that these bonds were issued without consideration. It is immaterial whether the original bonds were issued in violation of law or not, the consideration on which they were based being good. *Little Rock v. Merchants' National Bank*, 98 U. S. 308.

154. A law authorized the issue of municipal bonds. The election called to decide whether the issue should be made was called by the wrong corporate agency. This, under the decisions of the state court previously made would have made the bonds invalid, had there been nothing more. A curative statute was passed, however, and it became an open question whether the bonds were legalized thereby. Then a statute was passed authorizing the funding of bonds which were binding and legal obligations, and the issue of which had been duly authorized. A popular vote directed the funding of these bonds in others bearing a less rate of interest, and payable after a longer time. It was held that the municipality was estopped to dispute its liability on the new bonds. *Jasper County v. Ballou*, 103 U. S. 745.

155. Where the law authorizes the issue of county bonds in aid of a railroad, the county, when sued on bonds thus issued, cannot set up a constitutional prohibition against the assessment of taxes beyond a certain percentage of the valuation of the property in the county, it appearing that after the assessment of taxes to the amount of the limit, and payment of the ordinary county expenses, a surplus remains sufficient to pay a part of the amount of the bonds, and, moreover, it not appearing that the county has not other property besides revenues derived from taxation that may be subjected in payment of the amount. *Moultrie County v. Fairfield*, 105 U. S. 370.

**MUNICIPAL BONDS — IN GENERAL — continued.**

156. Where a county, having issued its bonds to a railroad company, has fallen into arrears in paying the interest, and contemplates contesting the validity of the bonds on the grounds that they were fraudulently issued and that the statute purporting to authorize their issue was unconstitutional, and the company effects a consolidation with another company on the assurance of the county, through its county court, that it will levy and collect a tax sufficient to pay the bonds in consideration of an extension of time being granted for their payment, the county is estopped from afterwards denying the validity of the bonds in the hands of a *bona fide* transferee for value from the consolidated company. *Tipton County v. Rogers Locomotive & Machine Works*, 103 U. S. 523.

157. A defence by a county to an action on municipal bonds which it was authorized to issue in aid of a branch line of a railroad company, will not be sustained on the ground that the line constructed was not a branch line, but an extension of the main line, where the former contention is equally tenable with the latter, where the county has had the benefit of the road, retains the stock received for the bonds, has voted on it, has paid interest on the bonds for several years, and redeemed some of them. *Howard County v. Booneville Central National Bank*, 108 U. S. 314.

158. Where a county was authorized to issue bonds for the purpose of funding its indebtedness, and the county records showed an estimate of the county indebtedness made by the county commissioners for the express purpose of fixing the amount of bonds to be issued, and in pursuance of which estimate they were issued, it was held that, conceding that a *bona fide* holder for value of the bonds was required to inspect the records instead of relying on the recitals in the bonds themselves, he was not bound to go beyond the record of the commissioner's estimate, and could not be affected by its falsity. *Sherman County v. Simons*, 109 U. S. 735.

159. — *Liability notwithstanding Invalidity of Bond.*] Where a city, in pursuance of authority supposed to be conferred by a void statute, issued bonds and lent them to a manufacturer to assist him, he conveying property to secure his obligation to pay them, and they were transferred to one who took them for value in good faith, and the city retained possession of the property, it was held that although the issue of the bonds was illegal, the proceeds of the property conveyed to secure them should be paid to their holder, the city first being reimbursed for expenses properly incurred in preserving the property, the holder standing on the right of the manufacturer to disaffirm the contract and reclaim the property. *Parkersburg v. Brown*, 106 U. S. 487.

160. Where a city having power to borrow money at not more than a certain rate per cent,

**MUNICIPAL BONDS — IN GENERAL — continued.**

and to provide for the payment of its debts, issues bonds for that purpose, the bonds being antedated in order to evade a law passed shortly before their issue, making registry by the state auditor essential to the validity of all municipal bonds thereafter issued, a purchaser of the bonds in good faith and without notice of their invalidity can recover the money paid for them with interest at the legal rate, although the bonds are invalid, the city having a right to borrow money; and this, although the bonds, on their face, bear interest at a rate greater than that allowed by law. *Louisiana v. Wood*, 102 U. S. 294.

*Circuit Court — Mandamus to compel Corporation to levy a Tax to pay Bonds not in Suit.*

See **MANDAMUS**, 6, 7.

*Decisions of State Courts relative to the issue of Municipal Bonds, followed by Federal Courts.*

See **FEDERAL COURTS — STATE LAWS**, **RULES OF DECISION**, 8 *et seq.*

*Guaranty by Railroad Company.*

See **RAILROAD — COMPANY**, 37.

*Interest on, by what Law recoverable.*

See **CONFLICT OF LAWS**, 22.

*Non-resident Holders not affected by Decree adjudging them void when there was but Constructive Service.*

See **JUDGMENT — CONCLUSIVENESS**, 36.

*Statute legalizing Elections on Question of Issue of Bonds — Public Act.*

See **STATUTES — CONSTRUCTION**, 42.

**MUNICIPAL BONDS — NEGOTIABILITY — To what Extent negotiable.]**

Where the bonds of a municipal corporation, with interest coupons attached, and payable to bearer, are put upon the market, they are to be treated as commercial securities; and the equities existing between the makers and the original payees cannot be inquired into in an action to recover the sum due thereon. *Moran v. Miami County Commissioners*, 2 Black, 722; *Mercer County v. Hackett*, 1 Wal. 83; *Gelpcke v. Dubuque*, 1 Wal. 176; *Meyer v. Muscatine*, 1 Wal. 384; *Thomson v. Lee County*, 3 Wal. 327; *Lexington v. Butler*, 14 Wal. 282.

2. It makes no difference that they bear the corporate seal. *Mercer County v. Hackett*, 1 Wal. 83.

3. Municipal bonds in the customary form, made payable to a named person or order, and indorsed in blank, possess the qualities and incidents of negotiable promissory notes; nor is the case altered by the fact that the holder is bound to receive the amount before maturity, if tendered, nor that a *bona fide* transferee for value would be bound by equities existing between the original parties. *Ackley School District v. Hall*, 113 U. S. 135.

**MUNICIPAL BONDS — NEGOTIABILITY — continued.**

4. Municipal bonds payable to a railroad company or to the holder, if transferred by the signature of the president of the company, are negotiable. *Wilson County v. Nashville Third National Bank*, 103 U. S. 770.

5. A municipal bond will not be deemed un-negotiable on the ground that its payment is made conditional on the construction of the road, where the language used imports, not a condition, but a recital merely of the reasons influencing the contract. *Humboldt Township v. Long*, 92 U. S. 642.

**MUNICIPAL CORPORATION — Fiscal Powers — In general.**

See MUNICIPAL CORPORATION — FISCAL POWERS.

**General Matters.**

See MUNICIPAL CORPORATION — GENERAL MATTERS.

**Liabilities — In general.**

See MUNICIPAL CORPORATION — LIABILITY.

**Officers — In general.**

See MUNICIPAL CORPORATION — OFFICERS.

**Powers in general.**

See MUNICIPAL CORPORATION — POWERS IN GENERAL.

**MUNICIPAL CORPORATION — FISCAL POWERS**

— In general — Power to borrow Money

— To issue Bills as Currency — To tax —

To issue Negotiable Paper.

See pl. 1-16.

*Power to aid Public Improvements by Donation, Subscription, and Issue of Bonds — Constitutional Limitations.*

See pl. 17-53.

*Power as affected by Legislative Action.*

See pl. 54-86.

1. — In general — Power to borrow Money — To issue Bills as Currency — To tax — To issue Negotiable Paper.] On the question of whether a municipal corporation, without express legislative authority, may borrow money, the court was equally divided. *Nashville v. Ray*, 19 Wal. 468.

2. A contract by a municipal corporation to pay a sum of money with interest to one who has assumed the payment of interest due and to become due on some of its debt, is a contract for the payment of a debt, not a borrowing of money, and so not within charter restrictions upon borrowing. *Gelpeke v. Dubuque*, 1 Wal. 221.

3. A city having power to borrow money, in making a loan may make it payable, principal and interest, where it pleases. *Meyer v. Muscatine*, 1 Wal. 384.

**MUNICIPAL CORPORATION — FISCAL POWERS — continued.**

4. A general statute restraining municipal corporations from creating any indebtedness, without providing at the same time for the payment of principal and interest, will not control a subsequent statute which, without prescribing such limitation, authorizes them to incur a special obligation. *United States v. New Orleans*, 98 U. S. 381.

5. The power conferred on a city by its charter to borrow money to take up its bonded indebtedness, is not taken away by a statute which, like the Missouri statute of March 28, 1872, provides that municipalities may fund their outstanding indebtedness by issuing new bonds in place of the old on such terms as may be agreed on between them and the holders of the bonds. *Louisiana v. Wood*, 102 U. S. 294.

6. A statute which, like the Missouri statute of February 16, 1872, forbids, under stated penalties, municipal officers from lending the credit, etc., of the municipalities that they represent, without the previous assent of two thirds of the voters, cannot be deemed to confer authority to lend the credit when such assent is given. [HARLAN, J., dissenting.] *Jarrolt v. Moberly*, 103 U. S. 580.

7. A provision in a city charter, that the council shall not borrow more than a specified sum for general purposes, does not limit the city debt, nor prohibit the making of a contract involving an expenditure exceeding that sum for special improvements authorized by the charter, such as the grading and paving of streets and the making of sidewalks. *Hutchcock v. Galveston*, 96 U. S. 341.

8. A municipal corporation having only the ordinary powers, including the power to borrow money and issue its bonds therefor, cannot issue bills to be used as currency, where the issue of such bills, except by banking institutions, is forbidden by a general statute. *Thomas v. Richmond*, 12 Wal. 349.

9. And where a municipal corporation issues bills to be used as currency, contrary to law, a holder for value, the bills being void, cannot maintain an action thereon. *Ib.*

10. Nor can he recover on a count for money had and received, especially where the receiving as well as the issuing of such bills is prohibited, the parties being *in pari delicto*. *Ib.*

11. That provision of the Illinois constitution of 1848 which vests in municipal corporations the power to tax for corporate purposes limits the power to taxation for those purposes, *i. e.*, purposes germane to the general scope of the object for which the corporation was created. Such is the construction of the state courts, and the supreme court adopts it. *Weightman v. Clark*, 103 U. S. 256.

12. The Illinois statute of April 19, 1869, authorizing municipal corporations to subscribe in aid of the state reform school for the purpose of

**MUNICIPAL CORPORATION — FISCAL POWERS**  
— continued.

securing its location within the corporate limits, was held, the decisions of the highest court of the state justifying such holding, not to conflict with the provision of the state constitution declaring that municipalities may tax for corporate purposes only. *Livingston County v. Darlington*, 101 U. S. 407.

13. On the question of whether a municipal corporation may issue paper which, in the hands of *bona fide* holders for value before maturity, is clothed with the usual attributes of negotiable paper, the court was equally divided. *Nashville v. Ray*, 19 Wal. 468.

14. Where, however, the paper thus issued consisted of checks or orders in form negotiable, drawn by the mayor of a city on its treasurer, received in payment of taxes, and again issued without authority, it was held, in a suit against the city by the holder of such orders, that the city might set up the holder's defective title. [CLIFFORD, SWAYNE, and STRONG, JJ., dissenting.] *Ib.*

15. On the question of whether a recovery might be had of the amount in fact paid for the orders (they having been purchased, on their reissue, at a discount from their face value), the court was equally divided. *Ib.*

16. A power to counties to build court-houses, etc., does not authorize the issue in payment thereof of bonds or other commercial paper having the privileges and exemptions ordinarily accorded to such paper, unless such authority is given by statute; nor is the rule otherwise in Tennessee. *Claiborne County v. Brooks*, 111 U. S. 400.

17. — *Power to aid Public Improvements by Donation, Subscription, and Issue of Bonds — Constitutional Limitations.* If not restrained by the organic law, the legislature of a state may authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. *Thomson v. Lee County*, 3 Wal. 327; *Rogers v. Burlington*, Id. 654; *Mitchell v. Burlington*, 4 Wal. 270; *Larned v. Burlington*, 4 Wal. 275.

18. And to issue bonds to aid in the construction of a railroad. *Pine Grove Township v. Talcott*, 19 Wal. 666.

19. And no such restraint is imposed by a constitutional provision which, like that of Michigan, ordains that no person shall be deprived of property without due process of law, that the credit of the state shall not be granted in aid of any person, association, or corporation, or that the state shall not be a party to, or interested in, any work of internal improvement. *Ib.*

20. It is no objection to a statute authorizing municipal aid in the construction of a railroad in a case otherwise proper, that it authorizes it to be extended in the form of a gift, rather than in the more usual mode of a subscription for

**MUNICIPAL CORPORATION — FISCAL POWERS**  
— continued.

stock. *Council Bluffs & St. Joseph Railroad Co. v. Otoe County*, 16 Wal. 667; *Olcott v. Fond du Lac County Supervisors*, Id. 678; *Queensbury v. Culver*, 19 Wal. 83; *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73; *Otoe County v. Baldwin*, 111 U. S. 1.

21. In New York, such donation may be made. *Queensbury v. Culver*, 19 Wal. 83.

22. County bonds may be issued and given to a railroad company, to aid the construction of a road outside of the county, or even outside of the state, the effect of the construction of the road being to give the county a desirable connection with some other region. *Council Bluffs & St. Joseph Railroad Co. v. Otoe County*, 16 Wal. 667; *Otoe County v. Baldwin*, 111 U. S. 1.

23. A constitutional provision that private property shall not be taken for public use without just compensation, is no restraint upon such legislation. *Council Bluffs & St. Joseph Railroad Co. v. Otoe County*, 16 Wal. 667.

24. There is nothing in the Illinois constitution, nor in public policy, restraining the legislature from declaring that certain townships may subscribe to the stock of a particular railroad company organized under a general law, and issue bonds in payment of the subscription. *Unity v. Burrage*, 103 U. S. 447.

25. A clause in the charter of a railroad company, authorizing commissioners of counties through which the road is to run to subscribe for stock and to issue county bonds in payment thereof, if so directed by popular vote, is not a contract within the meaning of the constitution; nor is a vote in favor of the subscription, without an actual subscription, pursuant thereto. *Aspinwall v. Daviess County Commissioners*, 22 How. 364.

26. Hence, bonds issued in payment of a subscription made after an amendment of the state constitution, prohibiting a loan of credit or a borrowing of money to pay such subscription, are void, although issued pursuant to a vote taken before the amendment took effect. *Ib.*

27. And where a statute conferring the power to issue bonds in aid of a railroad, and under which their issue is voted, is repealed, their issue cannot be compelled, even though, on the faith of the aid voted, money has been expended in the construction of the road, and though it appears that their issue was refused on another ground than that the statute had been repealed. *Wadsworth v. Eau Claire County Supervisors*, 103 U. S. 534.

28. In construing the article of the Illinois constitution of July 2, 1870, which prohibited municipal corporations from subscribing to the capital stock of railroad corporations, or from making donations to them, but which provided that the adoption of the article should not be construed as affecting the right to make subscriptions authorized under existing laws by vote be-

# **MUNICIPAL CORPORATION — FISCAL POWERS** — continued.

fore the adoption, it was held that a distinction was made between subscriptions and donations, the latter being prohibited under all circumstances, and that bonds issued after the adoption of the constitution, in payment of a donation voted before, were void. *Concord v. Portsmouth Savings Bank*, 92 U. S. 625.

29. The supreme court of Illinois, having otherwise construed this article, by a decision rendered before the decision in *Concord v. Portsmouth Savings Bank*, *supra*, but not called to the attention of the United States supreme court, and by similar decisions since, the United States supreme court adopts the rule announced by the Illinois court, and holds that no distinction exists between subscriptions and donations, and that bonds issued after the adoption of the constitution in payment of a donation voted before are valid. *Fairfield v. Gallatin County*, 100 U. S. 47; *Moultrie County v. Fairfield*, 105 U. S. 370.

30. A valid subscription or undertaking to subscribe is not affected by the adoption of the constitution, and bonds issued afterwards in pursuance of such subscription made or undertaking entered into before, are valid. *Moultrie County v. Rockingham Ten Cent Savings Bank*, 92 U. S. 631; *Clay County v. Society for Savings*, 104 U. S. 579.

31. The supreme court having assumed in several cases, in accordance with the decisions of the supreme court of Illinois, that the provision in the constitution of that state prohibiting the subscription by municipalities to the capital stock of railroad or private corporations, became operative July 2, 1870, declines to consider the question an open one, while the supreme court of the state adheres to its ruling. *Wade v. Walnut*, 105 U. S. 1.

32. Where a municipal corporation votes a donation to a railroad company, on condition that its road shall be run through the town, no authority existing to make the donation until the road shall be located and constructed, and the company gives notice of its acceptance of the donation, such notice of acceptance being, in effect, equivalent to saying that if the road shall be built the donation will be received, and not importing an undertaking on the part of the company to do more than it was required to do in any event, no contract arises, the obligation of which is impaired by construing a provision of a state constitution afterwards adopted as prohibiting the donation notwithstanding such vote and acceptance. *Concord v. Portsmouth Savings Bank*, 92 U. S. 625.

33. Where, under the Illinois statute of February 25, 1867, authorizing donations to a certain railroad company to be made by townships, a majority of the voters consenting, a donation was duly made and sanctioned by vote, and where, under the amendatory statute of February 24, 1869, authorizing the issue of bonds in payment

# **MUNICIPAL CORPORATION — FISCAL POWERS** — continued.

of such donations, and providing that an election might be held to determine whether donations should be paid by the issue of bonds, an election was held, and it was voted to issue bonds in payment of the donation, it was held that the provision in the amendatory act for an election to determine the question of whether bonds should be issued, satisfied the requirement of the state constitution that municipal debts shall be created only by the assent of the voters. *Harter v. Kernochan*, 103 U. S. 562; *Louisville v. Portsmouth Savings Bank*, 104 U. S. 469.

34. Where a town has voted to issue bonds in payment of a donation to a railroad on the day when a general state election determined that a new constitution should be adopted, which, if construed to have been adopted before the taking of the vote of the town, would have rendered the issue of the bonds illegal, it may be taken into consideration that the polls, in the case of the state election, were kept open till sunset, while the presumption arises from the facts connected with the town vote that it was completed before sunset; when necessary to determine conflicting rights, courts will take notice of fractions of a day. *Louisville v. Portsmouth Savings Bank*, 104 U. S. 469.

35. The prohibition contained in the Missouri constitution of 1865 against municipal corporations becoming stockholders in associations, etc., or loaning credit thereto, unless by a two-thirds vote, was not intended to take away any authority already granted. *Callaway County v. Foster*, 93 U. S. 567; *Scotland County v. Thomas*, 94 U. S. 682; *Henry County v. Nicolay*, 95 U. S. 619; *Ray County v. Vansycle*, 96 U. S. 675; *Macon County v. Shores*, 97 U. S. 273; *Schuyler County v. Thomas*, 98 U. S. 169; *Cass County v. Gillett*, 100 U. S. 585; *Louisiana v. Taylor*, 105 U. S. 454; *Ralls County v. Douglass*, 105 U. S. 728; *Dallas County v. McKenzie*, 110 U. S. 686.

36. So of the similar prohibition in the Mississippi constitution of 1869. *Calhoun County Supervisors v. Galbraith*, 99 U. S. 214.

37. A constitution which, while prohibiting municipalities from subscribing to the stock of railroad companies, makes an exception where subscriptions have been previously authorized by a popular vote under existing laws, does not deprive a city of the right to make a subscription previously voted without authority of law, except that conferred by a statute ratifying the action of the city, and passed before the adoption of the constitution. *Jonesboro v. Cairo & St. Louis Railroad Co.*, 110 U. S. 192.

38. A prohibition, like that of the Missouri constitution of 1865, against the loan by municipalities of their credit unless with the assent of two thirds of the voters, makes void bonds issued by a town for purchasing property to be given to a railroad company, the assent of the voters not



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being had. Such a use of bonds is merely an indirect way of giving the railroad company the use of the credit of the town. *Jarrold v. Moberly*, 103 U. S. 580.

39. That provision which declares that the legislature shall not authorize "any county, city, or town" to become a stockholder in, or to loan "its credit to, any company, association, or corporation unless two thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto," extends to townships. *Harshman v. Bates County*, 92 U. S. 569.

40. The Missouri "township aid act" of March 23, 1868, which authorizes county courts to subscribe, in behalf of townships, to the stock of railroad companies, and to issue bonds in payment of such subscriptions, if by the returns of an election duly called for that purpose it appears "that not less than two thirds of the qualified voters of the township voting at such election are in favor of such subscription," is not in conflict with that provision of the state constitution, which is the same substantially as that of the statute. [BRADLEY and MILLER, JJ., dissenting.] *Cass County v. Johnston*, 95 U. S. 360; *Cass County v. Jordan*, Id. 373; *Douglass v. Pike County*, 101 U. S. 677.

41. A statute authorizing a municipal corporation to subscribe to the stock of a railroad, where elections have already been held, "and a majority of the legal voters" "were in favor of the subscription," requires the votes of only a majority of the legal voters voting at an election regularly held. *St. Joseph Township v. Rogers*, 16 Wal. 644.

42. The provision of the Mississippi constitution declaring that no municipality shall be authorized to become a stockholder in, or lend its credit to, any company, etc., "unless two thirds of the qualified voters of such county, city, or town, at a special election or regular election to be held therein, shall assent thereto," requires only an assenting vote of two thirds of those actually voting, not of two thirds of those enrolled as qualified to vote. *Carroll County v. Smith*, 111 U. S. 556.

43. Where a Missouri statute authorized the issue of bonds by municipalities in aid of a certain railroad without requiring a submission of the question to a popular vote, and an amendatory statute authorized the location of a branch road, and the constitution of 1865, adopted in the interim, required a popular vote to authorize the issue of bonds by municipalities in aid of railroads, and declared that existing statutes should continue in force; and where a prohibition against special enactments did not extend to amendments of statutes in force at the time of the adoption of the constitution, bonds issued after the passage of the amendatory statute, in payment of a subscription made before, and transferred afterwards

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to the branch, were held valid, although no popular election was had. [MILLER, DAVIS, FIELD, and BRADLEY, JJ., dissenting.] *Callaway County v. Foster*, 93 U. S. 567. And see *Howard County v. Paddock*, 110 U. S. 384.

44. A subscription to a branch road, undertaken as an independent enterprise under the Missouri statute of March 21, 1868, regulating the construction of branches, is not subject to the provision of the constitution requiring a popular vote to authorize the issue of municipal bonds in its aid, the main road having been built under a statute in force at the time of the adoption of the constitution. *Henry County v. Nicolay*, 95 U. S. 619. Nor is it material that at the time of the subscription the company had assigned to another company a portion of its franchises. *Cass County v. Gillett*, 100 U. S. 585.

45. Where a Missouri county made a valid subscription to the stock of a railroad company before the adoption of the constitution of 1865, the subscription being authorized by a popular vote, as required by the statute under which it was made, and, after the adoption of the constitution, the county court, representing the county, transferred the subscription to another company, the company to which the subscription was voted releasing the county from all liability thereunder, it was held that the county could not contend, in an action brought by *bona fide* holders for value of bonds issued in payment of the transferred subscription, that the transfer was void because not authorized by a popular vote, interest having been paid on the bonds for five years, the county having the benefit of more miles of road than would have been the case had the contract made with the company in whose favor the subscription was voted been carried out, and the county having received certificates of stock in the company to which the transfer was made, and not having offered to surrender them. *Ray County v. Vansycle*, 96 U. S. 675.

46. Where taxpayers, as they might do under the New York law, authorized a subscription to the stock of a railroad company, and an issue of town bonds in payment thereof, on condition that the road should be constructed before the bonds should be delivered or sold, and the commissioners appointed to make the subscription and to make and issue the bonds agreed with the company that when its road should be constructed the subscription should be made and the bonds issued, and before the road was constructed an amendment to the state constitution was adopted prohibiting all municipal aid to corporations, it was held that the amendment did not impair the obligation of a contract, for the reason that the commissioners exceeded their powers in assuming to make an agreement not authorized by the taxpayers. *Buffalo & Jamestown Railroad Co. v. Falconer*, 103 U. S. 821.

# **MUNICIPAL CORPORATION — FISCAL POWERS** — continued.

47. Where a state authorizes the issue of county bonds in aid of the construction of a railroad, on condition of a popular vote in favor thereof, a subsequent statute dispensing with the condition is a valid exercise of legislative power. *Council Bluffs & St. Joseph Railroad Co. v. Otoe County*, 16 Wal. 667; *Otoe County v. Baldwin*, 111 U. S. 1.

48. A statute of Tennessee which confers power on the county courts of counties on the line of a particular railroad to subscribe without a popular vote to the stock of the company is valid, according to the tenor of the decisions of the supreme court of that state, which the supreme court of the United States adopts as controlling its decision of the question, notwithstanding the existence of a general statute requiring the county courts to subscribe to railroad stock when authorized by a popular vote, and notwithstanding the constitutional prohibition against the suspension of general laws for the benefit of particular individuals, and against the passage of laws granting special rights and privileges, the constitution providing that "the legislature shall have power to grant such charters of incorporation as may be deemed expedient for the public good." *Tipton County v. Rogers Locomotive & Machine Works*, 103 U. S. 523.

49. Where a state constitution, as, *e. g.*, that of Illinois, distinctly withholds from the legislature the power to confer on municipal corporations authority to incur indebtedness in excess of a prescribed amount, the bonds of a municipality issued beyond such amount are invalid, even in the hands of a *bona fide* holder for value, the bonds not containing recitals amounting to a representation that the requirements of the constitution were met, that is, that the indebtedness, increased by the amount of the bonds, was within the constitutional limit; and this is so although the bonds purport to have been issued under the authority of a statute and ordinance, neither of which recites that their issue was permitted by the terms of the constitution. *Buchanan v. Litchfield*, 102 U. S. 278.

50. A provision of a state constitution prohibiting donations by counties to railroads, etc., unless an election shall have been had, and declaring that such donations, when made, shall not exceed in amount ten per cent of the assessed valuation, but that by a two-thirds vote such indebtedness may be increased five per cent, does not authorize donations without legislative authority; and if a statute authorizes a donation of ten per cent, a further donation of five per cent cannot be made without additional legislative authority. *Dixon County v. Field*, 111 U. S. 83.

51. A legislature cannot authorize municipal corporations to contract debts for other than public purposes, where such debts must be paid by taxation; as, for instance, to issue bonds to aid in the establishment of manufactories and similar

# **MUNICIPAL CORPORATION — FISCAL POWERS** — continued.

private enterprises. [CLIFFORD, J., dissenting.] *Cleveland Citizens' Savings & Loan Association v. Topeka*, 20 Wal. 655.

52. A general grant of legislative power does not permit the enactment of a statute allowing a municipality to issue bonds in aid of a rolling-mill. *Cole v. La Grange*, 113 U. S. 1.

53. A statute authorizing the issue of bonds by a city to be lent to persons engaged in manufacturing, the city to pay the principal and interest, whether the borrower pays the city or not, and the inference being that the liability must be met by taxation, is invalid, the constitution of the state conferring no power to authorize the levy of taxes to be used to aid private persons in conducting a private manufacturing business. *Parkersburg v. Brown*, 106 U. S. 487.

54. — *Power as affected by Legislative Action.*] A municipal corporation cannot subscribe for stock in a public improvement, *e. g.*, a railroad, without special authority. *Thomson v. Lee County*, 3 Wal. 327; *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Kendall County Supervisors*, 105 U. S. 667.

55. A charter to a railroad company, *e. g.*, that conferred by the Illinois statute of February 18, 1861, which makes it "lawful for all persons of lawful age, or for the agent of any corporate body," to subscribe for stock, confers no such power on municipal, but only on private, corporations. *East Oakland Township v. Skinner*, 94 U. S. 255.

56. A congressional township, in Illinois, is a township for school purposes, and therefore cannot subscribe for railroad stock, nor issue bonds. *Weightman v. Clark*, 103 U. S. 256.

57. A city may aid in the construction of gas-works needed by its citizens, and may issue its bonds in aid thereof, unless prohibited by law. *New Orleans v. Clark*, 95 U. S. 644.

58. The administrative officers of a municipal corporation, having the usual powers, and among others the power to levy taxes to defray necessary expenses, have no implied power, for the purpose of raising money or funding a debt, to issue negotiable securities, which the corporation could not impeach in the hands of a *bona fide* holder. *Police Jury v. Britton*, 15 Wal. 566.

59. Where a statute in terms limits the expenditures of a municipal board, *e. g.*, a county board of chosen freeholders in New Jersey, to the amount to be raised by taxation for the current year, a purchase of property with county bonds to be paid from the appropriations of an ensuing year, is not within their power; and payment of the bonds may be enjoined, and a reconveyance of the land decreed, at the instance of resident taxpayers of the county. *Crampton v. Zabriskie*, 101 U. S. 601.

60. Bonds issued by a city in payment for land bought by the city and given to a railroad company are void even in the hands of a *bona fide*

**MUNICIPAL CORPORATION — FISCAL POWERS**  
— continued.

holder for value, no statute authorizing the issue of bonds for such a purpose, and the bonds reciting that they were issued in aid of the company. *Lewis v. Shreveport*, 108 U. S. 232.

61. Power to a city to borrow money and to issue bonds does not, without more, confer authority to subscribe to the stock of a railroad company and to issue bonds in payment thereof. *Jonesboro v. Cairo & St. Louis Railroad Co.*, 110 U. S. 192.

62. A general power in the charter of a municipal corporation "to borrow money for any public purpose," authorizes the borrowing of money to aid in the construction of a local railroad for public travel and transportation; and as a means of borrowing for that purpose, the corporation may issue its bonds to be sold by the railroad company, such an arrangement being in its result a borrowing of money, and a lending of credit only in form. [CHASE, C. J., and GRIER, MILLER, and FIELD, JJ., dissenting.] *Rogers v. Burlington*, 3 Wal. 654.

63. And so it authorizes the like proceedings in aid of the construction of a local plank-road. *Mitchell v. Burlington*, 4 Wal. 270; *Larned v. Burlington*, Id. 275.

64. The power of a city, in Illinois, to borrow money and to issue bonds for "corporate purposes," does not include the power to make a donation of bonds to aid "in developing the natural advantages of the city for manufacturing purposes." One, therefore, who takes such bonds with a knowledge of the purpose of their issue, cannot enforce their payment. *Ottawa v. Carey*, 103 U. S. 110.

65. Where, notwithstanding such want of power, a city issued bonds in pursuance of an ordinance purporting to authorize their issue for such purpose, the ordinance being entitled "an ordinance to provide for a loan for municipal purposes," and its title being recited in the bonds, it was held that a *bona fide* holder for value of the bonds was not chargeable with notice of the invalidity of the ordinance. *Hackett v. Ottawa*, 99 U. S. 86; *Ottawa v. National Bank*, 105 U. S. 342.

66. A statute, such as the Kansas statute authorizing towns or counties to issue bonds "for the purpose of building bridges, or to aid in the construction of railroads, water-power, or other works of internal improvement," there being another statute declaring all custom grist-mills to be "public mills," and regulating their management, authorizes the issue of town bonds to aid in the construction and equipment of a steam custom mill owned by an individual. [FIELD, J., dissenting.] *Burlington Township v. Beasley*, 94 U. S. 310.

67. A bridge intended for and used as a thoroughfare is a public highway, and hence a work of internal improvement, within the meaning of the Nebraska statute of February 15, 1869,

**MUNICIPAL CORPORATION — FISCAL POWERS**  
— continued.

authorizing cities, counties, and precincts in that state to issue bonds in aid of works of internal improvement; and that the bridge is a toll-bridge does not affect the case. *Dodge County Commissioners v. Chandler*, 96 U. S. 205; *United States v. Dodge County Commissioners*, 110 U. S. 156.

68. Improving the water-power of a river for the purpose of propelling public grist-mills is such a work. *Blair v. Cumming County*, 111 U. S. 363.

69. But a steam grist-mill is not such a work. *Osborne v. Adams County*, 106 U. S. 181; *Osborne v. Adams County*, 109 U. S. 1.

70. A statute which, like the Kansas statute of March 2, 1872, authorizes the issue of township bonds "to aid in the construction of railroads or water-power, by donation thereto, or the taking of stock therein, or for other works of internal improvement," authorizes a township to issue its bonds to aid in constructing within its limits the depots and side tracks of an existing railroad. *Rock Creek Township v. Strong*, 96 U. S. 271.

71. A statute authorizing a city to borrow money for the purpose of contributing to works of internal improvement, permits it to guarantee the bonds of a railroad company issued to pay a debt incurred in construction, and to pay for improvements. *Savannah v. Kelly*, 103 U. S. 184.

72. A statute authorizing a city "to obtain money" on its "faith and credit," for the purpose of "contributing to works of internal improvement," is not repealed by implication by a statute reciting doubts of the validity of bonds issued by the city, and enacting that they shall be valid, and that the city shall have power in certain ways and cases to issue other bonds for like purposes. *Id.*

73. A statute authorizing a municipal corporation to subscribe to the stock of a railroad company, as an individual might, authorizes it to issue its negotiable bonds in payment. *Seybert v. Pittsburg*, 1 Wal. 272.

74. The power to issue bonds in payment of a subscription, if clearly implied in the statute authorizing the subscription, will be deemed to exist as though expressed. *Wilson County v. Nashville Third National Bank*, 103 U. S. 770.

75. An act passed to enable a county to subscribe to the capital stock of a railroad, which authorized payment to be made on such terms and in such manner as might be agreed on, and provided that, *whenever bonds were given*, they should not be for sums less than one hundred dollars, etc., was held to authorize the issue of negotiable coupon bonds. *Curtis v. Butler County*, 24 How. 435. And see *Woods v. Lawrence County*, 1 Black, 386.

76. A statute which enacts that whenever a railroad company receives municipal bonds on a subscription to the stock of the company, the bonds may bear interest and may be sold by the

# **MUNICIPAL CORPORATION — FISCAL POWERS** — continued.

company, implies that the city (having power under its charter to borrow money) may subscribe for stock and issue bonds; and, as what is implied is as much a part of the statute as what is expressed, it gives validity to a subscription made and bonds issued, as perfectly as would a statute conferring authority expressly. *Gelpcke v. Dubuque*, 1 Wal. 220.

77. A power to a municipal corporation "to borrow money for any object, in its discretion," where there is a statute regulating the interest on municipal bonds issued to railroad companies on subscriptions for stock therein, and the discount at which they may be sold, confers authority to issue bonds to borrow money in aid of the construction of railroads, although the charter by which it is given grants no other power not of a nature strictly municipal. [MILLER, J., dissenting.] *Meyer v. Muscatine*, 1 Wal. 384.

78. The Iowa statute of 1855, regulating the interest on municipal bonds impliedly authorizes cities to issue bonds in payment of subscriptions to stock in railroad companies, and also authorizes them to be sold below par value. [MILLER, J., dissenting.] *Ib.*

79. A statute prohibiting a municipal corporation from creating a debt exceeding a certain amount is repealed *pro tanto* by a subsequent statute authorizing the council to subscribe for stock to a certain amount in a railroad company and issue municipal bonds therefor. *Amey v. Allegheny City*, 24 How. 364.

80. Under a statute which, like the Kansas statute of February 28, 1868, empowers cities of a certain class to protect their interests in railroads, to take private property for the purpose of giving the right of way or other privilege to any railroad company, to borrow money, etc., such a city, a majority of its voters approving, may issue bonds for the purpose of procuring a right of way for a railroad through the city, and for procuring grounds to be given to the railroad company for depots, yards, etc., and may attach conditions to its gift. *Converse v. Fort Scott*, 92 U. S. 503.

81. The words "certificates of loan," in a statute authorizing a municipal corporation to subscribe for stock in a railroad company and issue such certificates in payment therefor, are synonymous with the word "bonds." *Amey v. Allegheny City*, 24 How. 364.

82. A company is none the less a railroad company, within the meaning of a statute authorizing municipal subscriptions to the capital stock of such companies, because its charter vests it with power to carry on the business of a coal, or a mining, or a furnace, or a manufacturing company, in addition to that of a railroad company. *Randolph County v. Post*, 93 U. S. 502.

83. Under the Iowa code, a popular vote authorizing the county judge to levy a certain tax to build a court-house, the tax to be levied

# **MUNICIPAL CORPORATION — FISCAL POWERS** — continued.

annually until enough is raised for the purpose, the vote being on a submission of that question only, implies an authority to borrow money and to issue negotiable bonds for that purpose, and authority to take up such bonds in the hands of a contractor by bonds of a new issue bearing higher interest and payable at different times; a resort to the voters for authority being necessary under the code, only when a debt is to be incurred. [CHASE, C. J., and MILLER and FIELD, JJ., dissenting.] *Lynde v. Winnebago County*, 16 Wal. 6.

84. The power to issue bonds carries with it the power to make them payable, and to sell them beyond the limits of the county and of the state. *Ib.*

85. Where, as in Mississippi, the financial powers of county supervisors are limited to levying taxes and directing the appropriation of money coming into the county treasury, and do not include the power of borrowing money, a statute which authorizes them to subscribe to stock in a railroad corporation, and which contains provisions consistent with the contention that the subscriptions so authorized are to be paid by levying taxes and not by the issue of bonds, the settled policy of the state, moreover, requiring the current liabilities of counties to be discharged by current taxation, will not be deemed to authorize such issue, and bonds so issued are void even in the hands of a *bona fide* holder for value. *Wells v. Pontotoc County Supervisors*, 102 U. S. 625.

86. Authority conferred on the taxable inhabitants of a "strip of country" along the line of a railroad to vote a tax to take the stock of the railroad company, and on the county court to levy and collect such a tax, if voted, and to pay over the money, as fast as collected, to the company, does not authorize the issue of county bonds in anticipation of the tax; and bonds thus issued which show on their face that they were issued under such a statute are invalid even in the hands of a *bona fide* holder for value. Nor does the Missouri statute of March 23, 1868, amended by the statute of March 24, 1870, affect the case, that statute relating to municipal townships as such. *Ogden v. Daviess County*, 102 U. S. 634.

*Power to contract Debt — Includes Power and Duty to provide Means to pay.*

See MANDAMUS, 32.

*Power to tax.*

See CONTRACT — IMPAIRMENT OF OBLIGATION, 37, 38, 43.

# **MUNICIPAL CORPORATION — GENERAL MATTERS — Devise to, for Charitable Uses.**

See CHARITY, 11, 22, 31.

*Charter — Construction.*

See GRANT, 8.

**MUNICIPAL CORPORATION — GENERAL MATTERS — continued.**

*Contract not inoperative because Payment is to be made in Bonds the Issue of which is not authorized.*

See CONTRACT — WHAT CONSTITUTES, 34.

*Contracts for paving — Construction — Abutting Owners, etc.*

See CONTRACT — CONSTRUCTION, 43, 45, 49.

*Injunction to prevent Unlawful Use of Money, etc. — Issue at Suit of Taxpayer.*

See INJUNCTION, 18.

*Portion of State — Revenues exempt from Federal Taxation.*

See INTERNAL REVENUE — IN GENERAL, 4.

**MUNICIPAL CORPORATION — LIABILITY — Liability as affected by Change in Organization or Territory.**

See pl. 1-5.

*Liability for Defective Streets and Bridges.*

See pl. 6-16.

*Liability for Misconduct of Officers — For Value of Liquor destroyed during the War — When fixed, etc.*

See pl. 17-23.

*Enforcement of Liability — What may be levied on — Collection of Taxes, etc.*

See pl. 23-47.

1. — *Liability as affected by Change in Organization or Territory.*] Neither the identity of a municipal corporation, nor its right to hold property devised to it, is destroyed by a change of its name, an enlargement of its area, or an increase in the number of its corporators, such changes being within the competency of the legislature to make. *Girard v. Philadelphia*, 7 Wal. 1.

2. A change in the charter of a municipal corporation, or the substitution of a new one with substantially the same corporators and embracing the same territory, will not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities, although different powers are possessed under the new or amended charter, and different officers administer its affairs. *Broughton v. Pensacola*, 93 U. S. 366.

3. Where a municipal corporation is legislated out of existence and its territory annexed to other corporations, the latter, unless it is otherwise provided, take all its property and immunities, and are severally proportionately liable for its debts, and for the payment thereof may levy taxes on property and persons so brought within their jurisdiction; and it is against them that creditors have their remedy in equity. [MILLER, FIELD, and BRADLEY, JJ., dissenting.] *Mount Pleasant v. Beckwith*, 100 U. S. 514.

4. Where the legislature creates a city, carving

**MUNICIPAL CORPORATION — LIABILITY — continued.**

it out of territory before comprised in a town, and enacts that all bonds previously issued by the town shall be paid by city and town in the same proportions as if they were not separated, and that if either at any time pays more than its proportion, the other shall be liable therefor, a bill will lie to enforce payment by the two bodies respectively in proper proportions, — a bondholder not being confined to mandamus, or other legal remedies less plain and adequate, if such exist. *Morgan v. Beloit*, 7 Wal. 613.

5. During its change from a town to a village, under the Illinois statute of April 10, 1872, the municipality is not released from its obligation to keep its streets and sidewalks in a safe condition; and in case of an injury caused by a defect therein, it is not material that the village trustees were not authorized to make their annual appropriation for that year, they having power to borrow money for all necessary purposes, and the village having succeeded to the property of the town, as well as to its liabilities. *Evanston v. Gunn*, 99 U. S. 660.

6. — *Liability for Defective Streets and Bridges.*] A municipal corporation is liable for injuries received by an individual by reason of the unsafe condition of a street of which it has the care and control. *Chicago v. Robbins*, 2 Black, 418; *Nebraska City v. Campbell*, Id. 590; *Robbins v. Chicago*, 4 Wal. 657.

7. But it has a remedy over against the person through whose fault the street was left in such condition. *Chicago v. Robbins*, 2 Black 418; *Robbins v. Chicago*, 4 Wal. 657.

8. A statute which requires towns to keep their highways in repair so that they may be safe and convenient for travellers at all seasons, applies to the sidewalks of cities and to disrepair occasioned by snow and ice thereon. *Providence v. Clapp*, 17 How. 161.

9. If a municipal corporation be required by its charter to keep a bridge in repair, it will be liable to an individual for injury to person or property arising from neglect to perform that duty, or from negligence or unskillfulness in its performance. *Weightman v. Washington*, 1 Black, 39; *Nebraska City v. Campbell*, 2 Black, 590.

10. A municipal corporation authorized by law to improve a street by building on the line thereof a bridge over, or a tunnel under, a navigable river, incurs no liability for damages unavoidably caused to adjoining property by obstructing either the street or the river while the work is in progress, unless such liability is imposed by statute. *Northern Transportation Co. v. Chicago*, 99 U. S. 635.

11. As to the street, it makes no difference whether the fee is in the owner of such property or in the state; if in the former, the state has an easement to adapt the street to passage over its entire length and breadth. *Id.*

**MUNICIPAL CORPORATION — LIABILITY — continued.**

12. The District of Columbia, as a municipal corporation, is liable to an individual who has suffered injury from the defective condition of one of its streets, although the entire control of its streets is by its charter vested in a board of public works, consisting, as to four of its five members, of persons appointed by the president, the board being not an independent body acting for itself, but a part and an agency of the corporation. [SWAYNE, FIELD, STRONG, and BRADLEY, JJ., dissenting, on the ground that the corporation should not be held liable for the neglect of officers whom it could not select nor control.] *Barnes v. District of Columbia*, 91 U. S. 540; *Maxwell v. District of Columbia*, Id. 557; *Dant v. District of Columbia*, Id. 557.

13. The distinction between the liability of a municipal corporation like a city, and that of a quasi corporation like a town, for negligence in the care of streets, stated and declared to be settled. *Barnes v. District of Columbia*, 91 U. S. 540.

14. Where a municipal corporation is sued for an injury caused by an obstruction negligently left in a street of which it has taken charge and which it has treated and regulated as a public highway, it cannot throw the plaintiff upon inquiry into the regularity of the proceedings by which the street was established. *New York v. Sheffield*, 4 Wal. 189.

15. In an action against a municipal corporation for damages for injuries received from a fall caused by a defect in an unguarded sidewalk, the plaintiff may show that other like accidents had occurred at the same place while it was in the same condition. *District of Columbia v. Armes*, 107 U. S. 519.

16. Whether a sidewalk is reasonably safe and convenient, within the meaning of a statute requiring the town to keep it so, is a question for the jury, having regard to location and use. *Providence v. Clapp*, 17 How. 161.

17. — *Liability for Misconduct of Officers — For Value of Property destroyed during the War — When fixed, etc.* A municipal corporation is not responsible for the misconduct of a licensed auctioneer on the ground of agency. *Fowle v. Alexandria*, 3 Pet. 398.

18. Nor for the neglect of its officers to take a bond, as required by its ordinances, before issuing a license to an auctioneer. *Ib.*

19. Where the corporate authorities of a city in the confederacy, just as the city was on the point of falling into possession of the federal forces, ordered the destruction of all liquors therein and pledged the faith of the city for their value, having power generally under its charter so to do, it was held that the owner of liquor so destroyed could maintain an action for its value. [BRADLEY, J., dissenting, on the ground that such destruction was an act of war.] *Richmond v. Smith*, 15 Wal. 429.

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**MUNICIPAL CORPORATION — LIABILITY — continued.**

20. And that it was no answer to the action that just as the liquor was destroyed the premises where it was stored were about to take fire from a warehouse burned by order of the confederate government, against the remonstrance of the city, and that the premises were burned, so that the liquor would have been burned had it not been destroyed, and was of no value to the plaintiff. *Ib.*

21. Where a contract for the construction of certain public works for a city provides that they shall be completed under the supervision, and to the satisfaction, of a city officer, his acceptance of them is an announcement of his decision that the terms of the contract have been complied with, and binds the city. *Omaha v. Hammond*, 94 U. S. 98.

22. A city does not, by the mere adoption of a resolution to erect a public building according to certain plans for which it has paid the architect a prize, bind itself to pay a percentage on the estimated cost of the building. *Tilley v. Cook County*, 103 U. S. 155.

23. — *Enforcement of Liability — What may be levied on — Collection of Taxes, etc.* Where land has been condemned by a city for a street, the equitable owner of the compensation due may maintain a suit against the city to enforce payment thereof. *Chicago v. Tebbetts*, 104 U. S. 120.

24. Lands held by a city for public purposes, or ground rents arising therefrom and forming a part of its public revenues, are not subject to seizure and sale on execution. *Klein v. New Orleans*, 99 U. S. 149.

25. Property held by a city for public uses — such property as public buildings, fire-engines, etc. — cannot be subjected to the payment of the debts of the city. *Meriwether v. Garrett*, 102 U. S. 472.

26. And its liability is not affected by dissolution of the charter. The trust under which the property is held, so far as such liability is concerned, remains undevested. *Ib.*

27. City water-works cannot be seized under an execution against the city. *New Orleans v. Morris*, 105 U. S. 600.

28. Nor can shares of stock owned by the city in a corporation formed for the purpose of maintaining and enlarging such water-works to which the city has conveyed them, the statute authorizing the conveyance declaring that such shares shall not be liable to seizure for the debts of the city, but shall be reserved for the benefit of the holders of the bonds issued by the city to raise the means wherewith to construct the works. No obligation of a contract is impaired by such exemption, the shares being a substitute merely for the works. *Ib.*

29. In Tennessee, as in general, outside of New England, the private property of inhabitants of a city can be subjected to the payment of the

**MUNICIPAL CORPORATION — LIABILITY — continued.**

debts of the city, only through taxation. *Meriwether v. Garrett*, 102 U. S. 472.

30. Taxes levied, but not collected, before the repeal of the charter of a city are not property of the city, and, in the absence of statute, those other than such as were levied in obedience to the special requirement of contracts made under authority of law, and such as were levied under judicial direction for payment of judgments, cannot be collected by a court of equity through officers of its own appointment, and applied to the payment of the creditors of the city. Such taxes can be collected only under authority from the legislature. [SWAYNE, STRONG, and HARLAN, JJ., dissenting.] *Ib.*

31. Whether taxes levied to pay such special obligations can be collected through a receiver appointed by the court, there being no public officer charged with the duty of collecting them, *quære. Ib.*

32. A statute which provides, as does the Illinois statute of 1863, that county supervisors "may, if deemed advisable," levy a special tax to pay county debts which cannot be paid out of current revenue, is mandatory, and may be invoked by a county creditor in support of a mandamus. *Rock Island County Supervisors v. United States*, 4 Wal. 435.

33. So, also, the Illinois statute of 1852, incorporating the city of Galena, which provides that the city council may collect annually a tax of one per cent to pay the funded indebtedness of the city, if the council believe that the public good and the best interests of the city require; and it is no reason why a peremptory mandamus should not issue to compel a levy that one tax had been levied and the funds exhausted, nor that there were other creditors who would be entitled to share in the proceeds. *Galena v. Amy*, 5 Wal. 705.

34. That provision of the latter statute was not repealed by the act of 1857 in amendment thereof, nor by the act of 1865. *Ib.*

35. Where a statute permits municipalities to issue bonds in aid of railroads, and provides that they may levy a tax to pay the same, not to exceed a certain percentage on the assessed valuation of taxable property for each year, there being no express provision that only the fund so derived shall be so applied, a municipality against which a judgment on bonds thus issued has been obtained may be compelled, by mandamus, to levy an additional tax for its payment. [WAITE, C. J., and MILLER and BRADLEY, JJ., dissenting.] *United States v. Clark County*, 96 U. S. 211; *Macon County v. Huidekoper*, 99 U. S. 592; *Knox County Court v. United States*, 109 U. S. 229.

36. Not, however, beyond the amount authorized by the statutes in force at the time the bonds were issued. *United States v. Macon County*, 99 U. S. 582.

**MUNICIPAL CORPORATION — LIABILITY — continued.**

37. Under the Iowa code of 1851, which provides for the earliest practicable levy of taxes sufficient to pay judgments against municipal corporations, where there is no property that may be seized, the municipal authorities are bound to make the levy provided for, notwithstanding a subsequent charter provision, as, *e. g.*, in the charter of January 22, 1852, to the city of Muscatine, limiting the taxes to one per cent in any year, such a limitation applying only to taxation in the ordinary course of municipal action. *Butz v. Muscatine*, 8 Wal. 575.

38. Section 3275, Iowa Code, directing the levy of a tax to pay a judgment against a municipal corporation where the corporation issues no scrip or evidences of debt, and no property exempt from levy is found, confers no independent power to levy a specific tax in order to pay a judgment recovered on warrants for ordinary county expenditures. [CLIFFORD and SWAYNE, JJ., dissenting, on the ground that the court should follow its decision in *Butz v. Muscatine*, *supra*, notwithstanding that since that decision was rendered the Iowa supreme court decided the question otherwise.] *Carroll County Supervisors v. United States*, 18 Wal. 71.

39. The power conferred on a municipality to incur an obligation includes the power to meet it by taxation, unless the existence of such implied power is expressly negated. *Ralls County Court v. United States*, 105 U. S. 733.

40. Where the power of a county to levy taxes to "defray the expenses of the county" is limited to the levy of an annual tax not exceeding a certain amount, and the county afterwards is authorized to issue bonds and to "take proper steps to protect the interest and credit of the county," the power to levy a tax in payment of the liability incurred on the bonds is not limited; and, judgment being obtained, the levy of a tax for its payment will be compelled by mandamus without regard to the limit. *Ib.*

41. Nor, because in other instances special authority has been conferred by statute to levy a special tax under like circumstances, is it to be inferred that the power does not exist independently. *Ib.*

42. Mandamus will not issue to compel the levy of a special tax to pay interest on bonds issued in aid of a railroad for years before their issue, although the bonds, when issued, had attached to them coupons for interest which accrued, apparently, before their issue, the full amount authorized to be levied in any one year having been levied for the year during which the bonds were issued. *United States v. Clark County*, 95 U. S. 769.

43. Where a municipal corporation bound by contract to pay out of funds accruing from the tax levies for certain years neglects to comply therewith, and the contractor obtains a general judgment directing an immediate assessment on

**MUNICIPAL CORPORATION — LIABILITY — continued.**

the roll of the current year, he may be entitled to a levy according to the assessment roll of the year in which the levy is made. *Louisiana v. St. Martin's Parish*, 111 U. S. 716.

44. A statute conferring on a city power to levy taxes not in excess of a certain limit, "to pay the debts and meet the general expenses of said city," does not affect the right to levy taxes to pay debts incurred by special legislative authority. *Quincy v. Jackson*, 113 U. S. 332.

45. In Kansas, if there is no township trustee, it is the duty of the county commissioners to levy a tax sufficient to pay a judgment duly recovered against the township on bonds issued in payment of a railroad subscription, and the commissioners may be compelled, by mandamus, to perform this duty. *Cherokee County Commissioners v. Wilson*, 109 U. S. 621.

46. Holders of municipal bonds do not waive the right to insist on the levy of the special tax provided for by the statute which authorized their issue, by accepting for many years interest raised under a statute directing the levy of a general tax instead of a special one. *Louisiana v. Pillsbury*, 105 U. S. 278.

47. Where a public corporation charged with the duty of building and repairing levees within a certain district in Louisiana is superseded in its functions by a law dividing the district, and creating a new corporation for one portion and placing the other in charge of the local authorities, a judgment creditor of the original corporation cannot have a writ of mandamus to enforce an assessment of taxes for its payment, there being no officers of the original corporation to whom the writ can be directed, the functions of those officers ceasing, in the absence of any special provision, on the expiration of their terms, and the new corporations, in the absence of special authority, having no power to levy taxes for such purpose, their territorial jurisdiction being different from that of the original one; nor can the court order the marshal to make a levy for such a purpose; nor is there any remedy for such creditor save at the hands of the legislature. *Barkley v. Levee Commissioners*, 93 U. S. 258.

**Liability — When may be taken away.**

See **CONTRACT — IMPAIRMENT OF OBLIGATION**, 67.

**Mandamus to compel Levy of Tax — When issued.**

See **MUNICIPAL BONDS — IN GENERAL**, 87.

**Mandamus to compel Levy and Collection of Tax, directed to Mayor and Aldermen, when.**

See **MANDAMUS**, 78.

**Mandamus to compel Levy of Tax to pay Judgment — Interest on Bonds — Contracts.**

See **MANDAMUS**, 28 *et seq.*

**MUNICIPAL CORPORATION — OFFICERS — Qualifications, Duties, etc.]**

In Illinois, a town supervisor, town clerk, or justice of the peace, continues in office, and is not relieved from his duties and responsibilities as a member of the board of auditors, until his successor is appointed or chosen and qualified, although his resignation has been tendered and accepted. *Badger v. United States*, 93 U. S. 599.

2. The law of Kansas does not require a township treasurer to be a resident of, or a voter in, the township when elected or qualified, nor vacate the office if he removes from the township during his term; and while in some circumstances removal might have that effect, a removal "across the line" into an adjoining township merely, cannot. *Salamanca Township v. Wilson*, 109 U. S. 627.

**Service of Process — What Officer served on.**  
See **CONFISCATION**, 64.

**MUNICIPAL CORPORATION — POWERS IN GENERAL — Power over Streets — To take as**

**Devisee to Charitable Uses — To compromise, to lease, to contract, etc.**

See pl. 1-11.

**Police Power — Over Vessels in Port — To license Ferries — To arrest Construction of Buildings — To regulate Railroads, etc.**

See pl. 12-24.

**Execution of Power — How executed.**

See pl. 25-28.

1. — **Power over Streets — To take as Devisee to Charitable Uses — To compromise, to lease, to contract, etc.]** Power to the corporation of a city to make such by-laws and ordinances for the grading of streets as may be thought necessary is a continuing power. *Goszler v. Georgetown*, 6 Wheat. 593.

2. A city ordinance passed for the grading of streets, under a continuing power to pass ordinances for such purposes, providing that the grade established thereunder should forever thereafter be considered as the true grade, and be binding on the corporation, is not so far a compact that it may not be altered by the corporation. *Id.*

3. Power to a city "to open and keep in repair" streets and alleys, includes the power to establish a grade, and to change it when established; and for its proper exercise the city is not liable to the owners of property. *Smith v. Washington*, 20 How. 135.

4. A tract of land adjacent to the city of Chicago, belonging to the United States, which had been reserved for a fort and on which public buildings had been erected, was platted by an agent of the government as an "addition" to the city, divided into lots and laid out with streets through the entire tract, and that part thereof which was not occupied was sold to private persons. It was held not within the corporate



**MUNICIPAL CORPORATION — POWERS IN GENERAL — continued.**

power of the city to open the streets through the land not sold. *United States v. Chicago*, 7 How. 185.

5. The corporation of the city of Philadelphia is capable of taking under a devise of real and personal estate in trust for the establishment and support of a college for poor orphan boys, and of executing the trust. *Vidal v. Girard*, 2 How. 127.

6. The cities of New Orleans and Baltimore, as corporations, may take by devise, in trust, for the purpose of establishing public schools for the gratuitous education of the poor. *McDonogh v. Murdoch*, 15 How. 367.

7. The city of Cincinnati, having legal capacity to take and hold property, may take under a bequest in trust to establish colleges for the education of boys and girls, the purposes of such a trust being germane to the object of the corporation, as tending to the suppression of vice, the growth of virtue, and the promotion of industry and happiness, although the act of incorporation have for its main object mere municipal government. *Perin v. Carey*, 24 How. 465.

8. The right of a municipal corporation to take under or to execute a valid trust, can be contested by the state alone. *Girard v. Philadelphia*, 7 Wal. 1.

9. Notwithstanding the provisions of the Louisiana statute of 1880, creating a board of liquidation of the debt of New Orleans, a compromise made between the city council and a railroad company, respecting a controversy concerning the use of the batture by the company, was authorized under the general powers conferred on the council by the statute of 1882. *New Orleans Board of Liquidation v. Louisville & Nashville Railroad Co.*, 109 U. S. 221.

10. Where, during the military occupation of New Orleans in 1865, the mayor, pursuant to a resolution of the boards of finance and of street-landings (both the mayor and the boards deriving their authority from the appointment of the military commander), leased certain city water-front property for ten years, it was held that the lease bound the city after the military occupation was ended, it being a fair exercise of the power vested in the mayor and boards aforesaid. [FIELD, J., dissenting, and HUNT, J., concurring in the judgment only on the ground that the city by its conduct ratified the lease.] *New Orleans v. Steamship Co.*, 20 Wal. 387.

11. Where a board of commissioners was authorized to make contracts for the building of levees, to borrow money, and to issue bonds and negotiate them at not more than a certain rate of discount, it was held that, in the absence of proof of an intention to evade the law, and of proof that money could be obtained otherwise, a contract to pay for the construction of levees in bonds at a rate of discount greater than that specified in the statute was valid, although the price thus paid exceeded that for which sub-

**MUNICIPAL CORPORATION — POWERS IN GENERAL — continued.**

contractors did the work for cash. *Hemingway v. Stansell*, 106 U. S. 399.

12. — *Police Power — Over Vessels in Port — To license Ferries — To arrest Construction of Buildings — To regulate Railroads, etc.*] A city ordinance prescribing the place at which a vessel in the port may anchor, and for what time, and what kind of light she shall display, may be valid if there be no federal enactment on the subject, and if not in conflict with the general admiralty law. *The John Fraser*, 21 How. 184.

13. Although a city council, acting in its legislative capacity, must in general act by ordinance, yet it may license a ferry, there being no provision in the charter for any special mode, by contract in writing, signed by the mayor. *Fanning v. Gregoire*, 16 How. 524.

14. The power to license is a police power, though it may also be exercised for the purpose of raising revenue. A ferry company cannot, therefore, under a clause in its charter limiting the right to tax it, but expressly providing that a city may exercise over it customary police powers, contend that the imposition of a license fee for each boat used is unlawful. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

15. A grant of a right to erect gas-works and make and vend gas in a city for a term of years at a limited price, does not amount to an exemption from the imposition of a license tax for the use of the privilege. *Memphis Gas-Light Co. v. Shelby County Taxing District*, 109 U. S. 398.

16. If the proper officer give a permit for the erection of certain specially described buildings in Washington city, a clear case of danger to the public safety, or of departure from the permit, must be made, before the party acting under it can be arrested midway in the construction of them, and required to remove them. *Dainese v. Cooke*, 91 U. S. 580.

17. In Massachusetts, and under the ordinances of Boston, the owner of buildings destroyed in order to prevent the spreading of fire cannot recover therefor from the city without first showing an order for their destruction by three or more engineers of the fire department, of whom the chief engineer, if present, must be one. *Bowditch v. Boston*, 101 U. S. 16.

18. A municipal ordinance prohibiting washing and ironing in public laundries between ten at night and six in the morning is a police regulation, and does not interfere with rights guaranteed by the federal constitution. It deprives no one of property without due process of law, nor does it deny to any person the equal protection of the laws. *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, Id. 703.

19. It does not discriminate unwarrantably against those engaged in that especial business, nor does it unfairly discriminate against certain

**MUNICIPAL CORPORATION — POWERS IN GENERAL — continued.**

branches of the business, because it does not prohibit the fluting, polishing, bluing, and wringing of clothes between those hours. *Soon Hing v. Crowley*, 113 U. S. 703.

20. Nor is it open to objection on the ground of unlawfully abridging the right to work at all times. *Ib.*

21. Nor can it be impeached by an attack on the real motive of the municipal authorities establishing it, it being on its face a valid exercise of the police power. *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, *Id.* 703.

22. The fact that certain requirements of a police regulation may be burdensome does not make the regulation a violation of a constitutional right. *Barbier v. Connolly*, 113 U. S. 27.

23. A city ordinance prohibiting the use of locomotives in the public streets is a legitimate exercise of the power of a city government, when it does not interfere with vested rights. A railroad company is not thereby deprived of its property without due process of law, nor is it denied the equal protection of the laws, because it alone is named in the ordinance, no other company having any right so to use locomotives. *Richmond, Fredericksburg, & Potomac Railroad Co. v. Richmond*, 96 U. S. 521.

24. A municipal ordinance authorized by statute, granting a railroad company a right of way on certain conditions, is not a mere contract, under which a third person can derive immediately no private right. Although in form a contract, it has the force of law. *Hayes v. Michigan Central Railroad Co.*, 111 U. S. 228.

25. — *Execution of Power — How executed.* A provision in the charter of a municipal corporation, requiring ordinances to be recorded within a certain time, can have no application to an ordinance passed under authority of a subsequent statute, especially where that provision is limited to such ordinances as are authorized by the charter. *Amey v. Allegheny City*, 24 How. 364.

26. The properly constituted authorities of a municipal corporation may bind the corporation whenever they have power to act in the premises. *Cincinnati v. Morgan*, 3 Wal. 275.

27. Where a city council is vested with power to cause sidewalks to be constructed, it may authorize the mayor and the chairman of the committee on streets to make in its behalf, and pursuant to its directions, a contract for doing the work. *Hückcock v. Galveston*, 96 U. S. 341.

28. A contract entered into by a city must be carried out by the city in the mode specifically pointed out by the local law authorizing it; such a contract cannot be modified as if made

**MUNICIPAL CORPORATION — POWERS IN GENERAL — continued.**

under the general power of the city to make ordinary contracts. *Memphis v. Brown*, 20 Wal. 289.

*Authority to establish Dock and Wharf Lines, etc. — Construction of Statute.*

See **WATERS**, 28, 30.

*Authority to prescribe Landing-places for Vessels.*

See **COMMERCE**, 18, 19.

*Regulation of Commerce — Unlawful Attempts to regulate.*

See **COMMERCE**, 18, 19, 34.

**MUNICIPAL LAW — Extra-territorial Effect.]**

The municipal laws of a nation do not extend, in their operation, beyond that nation's territory, except as regards its own citizens. A seizure, therefore, for the breach of the municipal laws of one nation cannot be made within the territory of another. *The Apollon*, 9 Wheat. 362.

**MURDER — Arrest of Mail-carrier for — No Obstruction of Mail.**

See **POST-OFFICE**, 21.

*Evidence of Self-defence — Affecting Degree.*

See **HOMICIDE**, 1, 2.

*Homicide — In general.*

See **HOMICIDE**.

*Jurisdiction — Murder committed on High Seas — Jurisdiction of Federal Courts — Pleading.*

See **PIRACY**, 16, 19.

*Jurisdiction — Circuit Court — Crime committed within the Jurisdiction of a State — Within Indian Reservation.*

See **CIRCUIT COURT — JURISDICTION**, 17, 18, 25.

*Jurisdiction — White Man, when not deemed Indian and exempt from Trial in Federal Court.*

See **INDIANS**, 31.

*Statute altering Effect of Sentence of Murder in First Degree — Ex Post Facto Laws.*

See **EX POST FACTO LAW**, 15.

*Trial — Examination of Jurors in Absence of Accused.*

See **JURY**, 59.

**MUTUAL — Debts and Credits — Mutual Debts and Mutual Credits, correlative.**

See **BANKRUPTCY — PROCEEDINGS TO CONVERT ESTATE**, 41.

*Insurance Company — In general.*

See **INSURANCE**.

## N.

**NAME** — *What constitutes, etc.*] The law knows but one Christian name, and the omission or insertion of a middle name, or its initial letter, is immaterial. *Games v. Dunn*, 14 Pet. 322.

2. In tracing titles, identity of names is, *prima facie*, evidence of identity of persons. *Stebbins v. Duncan*, 108 U. S. 32.

*Mistake in Christian Name of Patentee in Patent for Public Lands — Patent gives no Title.*

See LANDS OF UNITED STATES — PATENT, 49.

*What constitutes — Mistake in Initial of Middle Name.*

See DEPOSITION, 2.

**NATIONAL BANK** — *Organization — Authority necessary.*

See pl. 1.

*Power — To buy and sell Coin, certify Checks, receive Special Deposits, lend Money — To compromise Claims, guarantee Payment, deal in Stocks — To acquire a Lien on Debtor's Stock.*

See pl. 2-14.

*Liability — For Unauthorized Act of Cashier — For permitting Transfer of Stock without Surrender of Certificate.*

See pl. 15, 16.

*Winding up — Suits by Receiver — Power and Duty of Comptroller — Liability of Shareholders — Rights of Creditors, Depositors, Government, etc. — Status of Bank pending Liquidation.*

See pl. 17-44.

*Suits by and against — Where brought — What Defences available.*

See pl. 45-50.

*Taxation of Shares — Rate — Limitation — Equality, etc., necessary.*

See pl. 51-73.

*Usury — What constitutes — Effect.*

See pl. 74-81.

*Criminal Liability of Officials under Rev. Sts. § 5209.*

See pl. 82-95.

1. — *Organization — Authority necessary.*]

No authority other than that conferred by congress is required to enable a bank existing under a state law to become a national bank; and the certificate of the comptroller is conclusive as to

**NATIONAL BANK** — *continued.*

the completeness of the organization, in a suit to enforce the liability of a stockholder or a contract with the bank. *Casey v. Galli*, 94 U. S. 673.

2. — *Power — To buy and sell Coin, certify Checks, receive Special Deposits, lend Money — To compromise Claims, guarantee Payment, deal in Stocks — To acquire a Lien on Debtor's Stock.*] Under the national banking act of June 3, 1864 (13 Sts. 99), which authorizes banks organized thereunder to buy and sell coin, such a bank, having coin in pledge, may sell and assign its special property therein, with all its legal rights. *Merchants' National Bank v. State National Bank*, 10 Wal. 604.

3. The provision of the act, that a bank shall transact its usual business at an office or banking-house in the place specified in its certificate of organization, does not prevent it from purchasing coin at the banking-house of another bank. *Ib.*

4. Section 23, which prohibits the issue of notes other than the ordinary bank-bills to circulate as money, does not forbid the certification of checks given in the usual course of business. *Ib.*

5. National banks may receive special deposits. This is clearly implied from Rev. Sts. § 5228, which provides that such banks, on their failure to pay their circulating notes, while stopping business generally, may "deliver special deposits." *Carlisle First National Bank v. Graham*, 100 U. S. 699.

6. Even if the law did not confer the power, a bank accustomed to take such deposits with the knowledge and acquiescence of the directors would be liable for such a deposit lost through gross negligence. *Ib.*

7. A national bank cannot make a valid loan or discount on the security of its own stock, except to prevent a loss on a debt previously contracted in good faith. *South Bend First National Bank v. Lanier*, 11 Wal. 369.

8. The placing by a bank of its funds in permanent deposit with another bank, is a loan within the meaning of the act. *Ib.*

9. There is nothing in the letter or spirit of the act which prohibits a loan by a bank on the security of the stock of another bank. *Germania National Bank v. Case*, 99 U. S. 628.

10. In compromising a contested claim resulting from a legitimate banking transaction, a national bank may pay a sum larger than otherwise would be exacted in order thereby to obtain a transfer of stocks, if it be done honestly in the belief that in the future they may be turned into money so favorably as to prevent a part or the

**NATIONAL BANK — continued.**

whole of the loss, such a transaction not being a dealing in stocks in violation of its charter. *Charlotte First National Bank v. Baltimore National Exchange Bank*, 92 U. S. 122.

11. A national bank may guarantee the payment of a note which it takes and negotiates, and the benefit of the proceeds of which it retains, and the authority of the vice-president, who is also a director, to make the guarantee will be presumed, and may not be denied. *People's Bank v. Manufacturers' National Bank*, 101 U. S. 181.

12. National banks have no power to deal in stocks; for although the power is not expressly denied by the national banking act, denial is implied by the want of a grant of it. *Charlotte First National Bank v. National Exchange Bank*, 92 U. S. 122.

13. A national bank cannot acquire a lien on its debtor's stock therein, such an acquisition being against the policy of the act, and a permission not being inferable from its general expressions. *Bullard v. National Eagle Bank*, 18 Wal. 589. And see *South Bend First National Bank v. Lanier*, 11 Wal. 369.

14. Nor can a by-law give such a lien. Such a by-law is not "a regulation of the business of the bank, nor a regulation for the conduct of its affairs," which it is empowered to make. [CLIFFORD, J., dissenting.] *Bullard v. National Eagle Bank*, 18 Wal. 589.

15. — *Liability — For Unauthorized Act of Cashier — For permitting Transfer of Stock without Surrender of Certificate.* Where the cashier of a national bank buys coin in its behalf, and the coin goes into the funds of the bank, the bank is liable on the principle of *quantum valebant*, although the cashier be without authority to make such purchase. *Merchants' National Bank v. State National Bank*, 10 Wal. 604.

16. Where a bank allows a stockholder to transfer his stock on the books of the bank, without producing and surrendering the certificate therefor, it is liable to a *bona fide* transferee for value of the same stock who produces the certificate with power of attorney to transfer, the certificate being in the usual form, declaring the stock transferable on the books on surrender of the certificate, and not otherwise; and this, although the bank had no notice of the latter transfer. *South Bend First National Bank v. Lanier*, 11 Wal. 369.

17. — *Winding up — Suits by Receiver — Power and Duty of Comptroller.* A receiver of a national bank, appointed by the comptroller of the currency under § 50, act of 1864 (13 Sts. 114), which provides that he may act "under the direction of the comptroller," may sue for an ordinary debt due to the bank without an order from the comptroller. The words "under the direction," etc., mean no more than that the receiver shall be subject to direction, not that he shall do no act without special instructions; and the collection

**NATIONAL BANK — continued.**

of assets is one of his ordinary official duties. *Metropolis National Bank v. Kennedy*, 17 Wal. 19.

18. He may sue either in his own name or in the name of the bank. *Ib.*

19. The debtors of a national bank sued by a person whom the comptroller, professing to act under section 50, has appointed receiver, cannot inquire into the lawfulness of the appointment. *Cadle v. Baker*, 20 Wal. 650.

20. The institution of a suit by the receiver against the shareholders, under section 50, must be preceded by action on the part of the comptroller touching their personal liability, and the fact of such action must be averred. *Kennedy v. Gibson*, 8 Wal. 498.

21. A letter written by the comptroller to the receiver, directing him to institute legal proceedings to enforce the personal liability of shareholders, sufficiently shows that the comptroller, before suit brought, decided that it was necessary to enforce it, no objection being made to the introduction in evidence of the letter, and no further proof being demanded. *Bowden v. Johnson*, 107 U. S. 251.

22. The amount to be paid by shareholders of a national bank which has become insolvent rests in the judgment and discretion of the comptroller; and his determination is conclusive, and cannot be controverted by a shareholder in an action brought against him by the receiver to enforce his liability. *Kennedy v. Gibson*, 8 Wal. 498; *Casey v. Galli*, 94 U. S. 673; *Germania National Bank v. Case*, 99 U. S. 628.

23. It cannot, therefore, be contended by the shareholder that the comptroller does not intend exacting similar contributions from other shareholders. *Casey v. Galli*, 94 U. S. 673.

24. The liability of the shareholders is several, not joint; and after the comptroller has duly assessed them, he may not be compelled to make another assessment because some of them are insolvent, or cannot, for other reasons, be made to respond. *United States v. Knox*, 102 U. S. 422.

25. Nor can it be contended that the comptroller intends paying claims for which the bank is not responsible, and that, but for this, contributions from shareholders would not be necessary. *Casey v. Galli*, 94 U. S. 673.

26. If the comptroller orders the collection of an amount equal to the full par value of the stock, the receiver's suit must be at law, not in equity, the amount being liquidated. *Ib.*

27. And interest is properly chargeable after the date of the comptroller's orders, the amount then being due and payable. *Ib.*; *Bowden v. Johnson*, 107 U. S. 251.

28. Section 56, act of 1864, which provides that suits under the act in which federal officers or agents are parties shall be conducted by the district attorney, is so far directory merely that shareholders cannot invoke it to defeat a suit

**NATIONAL BANK — continued.**

against them by a receiver brought and conducted by private counsel employed by the receiver with the approval of the proper department. *Kennedy v. Gibson*, 8 Wal. 498.

29. It is no objection to such a bill that shareholders averred to be without the jurisdiction are not joined as defendants. *Ib.*

30. The receiver is the proper party complainant against the shareholders, and the creditors are not proper parties. *Ib.*

31. Where, pending a suit by a receiver of a national bank to enforce the personal liability of a stockholder, a new receiver is appointed, and a decree is afterwards entered dismissing the bill, and an appeal is taken to the supreme court in the name of the first receiver with the other as surety in the appeal-bond, the court, under § 954, Rev. Sts., may permit the substitution of the first receiver in place of the other as party appellant. *Bowden v. Johnson*, 107 U. S. 251.

32. — *Winding up — Liability of Shareholders.*] A party who, by way of pledge or collateral security for a loan, accepts stock of a national bank which he causes to be transferred to himself on its books, incurs immediate liability as a shareholder, and he cannot relieve himself therefrom by making a colorable transfer of the stock, with the understanding that at his request it shall be re-transferred. *Germania National Bank v. Case*, 99 U. S. 628.

33. The title to shares of national bank stock passes when the owner delivers his stock certificate to a purchaser, with authority to him or to any one whom he may name to transfer the shares on the books of the bank. Acting thus in good faith, the seller cannot be compelled to retake the stock at suit of a receiver of the bank because, through the purchaser, the shares have become the property of the bank. *Johnston v. Laflin*, 103 U. S. 800.

34. If a shareholder transfer his shares to an irresponsible person on the eve of the failure of the bank, the shareholder knowing or believing the failure to be imminent, he cannot by such transfer relieve himself of the personal liability for the bank's debts which the statute imposes on shareholders. *Bowden v. Johnson*, 107 U. S. 251.

35. Where one takes an assignment of national bank stock as security for a loan, and afterwards transfers it to an irresponsible person to avoid a possible future assessment in case of the failure of the bank, and receives no dividends, and exercises none of the rights of a shareholder, he incurs no liability to the creditors of the bank. [MILLER and MATTHEWS, JJ., dissenting.] *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479.

36. The receiver of an insolvent national bank may invoke the jurisdiction of a court of equity to enforce the personal liability of one who has transferred his shares to an irresponsible person for the purpose of escaping liability, the bill seeking a discovery, and the transfer being good as

**NATIONAL BANK — continued.**

between the parties thereto. *Bowden v. Johnson*, 107 U. S. 251.

37. The property of a national bank attached at the suit of an individual creditor after the bank has become insolvent, cannot be subjected to sale for the payment of his demand, as against the claim of a receiver subsequently appointed. *Selma First National Bank v. Colby*, 21 Wal. 609.

38. The decision of the receiver on the validity of a claim presented to him for a dividend is not final; the creditor may proceed afterwards to have his claim adjudicated by the proper state court. *Bethel First National Bank v. Danbury National Pahquioque Bank*, 14 Wal. 383.

39. — *Winding up — Rights of Creditors, Depositors, Government, etc.*] A creditor of an insolvent national bank, who establishes his debt by suit and judgment after the refusal of the comptroller to allow it, is entitled to dividends based on the amount of the debt at the time of the failure, not at the time of the judgment, if the judgment includes interest beyond the time of the failure. *White v. Knox*, 111 U. S. 784.

40. A depositor in a national bank, which suspends payment, is entitled to interest from the date of his demand; and, when proved to the satisfaction of the comptroller, his claim stands on the footing of a judgment, and interest is to be computed under the rule applicable to the computation of interest on judgments. *Commonwealth National Bank v. Mechanics' National Bank*, 94 U. S. 437.

41. The United States cannot enforce payment of a debt from an insolvent national bank from a surplus remaining in the treasury of the proceeds of the bonds deposited as security for the circulating notes of the bank, §§ 5162, 5167, Rev. Sts., expressly declaring that such bonds shall be held in trust for the payment of the circulating notes. Nor is the relation of the United States to the fund changed by the forfeiture of the bonds by the comptroller of the currency. *Cook County National Bank v. United States*, 107 U. S. 445.

42. — *Winding up — Status of Bank pending Liquidation.*] A national bank does not lose its corporate existence by mere default in paying its circulating notes, nor upon mere appointment of a receiver; and it may be sued, although such an appointment has been made. *Bethel First National Bank v. Danbury National Pahquioque Bank*, 14 Wal. 383.

43. A national bank in voluntary liquidation may sue and be sued, by name, for the purpose of winding up its business; and it is no defence to a suit on a disputed claim that, under § 2, act June 30, 1876 (19 Sts. 63), the plaintiff has also filed a creditor's bill to enforce the individual liability of the shareholders. *Central National Bank v. Connecticut Mutual Life Insurance Co.*, 104 U. S. 54.

44. A suit against a national bank to enforce collection of a demand is abated by a decree of a

**NATIONAL BANK — continued.**

district court dissolving it and forfeiting its rights and franchises, rendered on an information filed by the comptroller of the currency. *Selma First National Bank v. Colby*, 21 Wal. 609.

45. — *Suits by and against — Where brought — What Defences available.*] Under § 57, act of 1864, suits may be brought by as well as against a banking association, although the word "by" is omitted in the act, it being apparent from the reason of the matter and from a corresponding provision of a preceding statute that the omission was accidental. *Kennedy v. Gibson*, 8 Wal. 498.

46. Under that act a national bank may sue where it is located in any state court having jurisdiction in similar cases. The objection to the jurisdiction founded in the character of such banks as instruments of the national government cannot prevail over the express provision of the statute. *Bethel First National Bank v. Danbury National Pahquioque Bank*, 14 Wal. 383.

47. A national bank can be sued in a state court in a local action in a county or city other than that in which the bank is established. The restriction of the statute applies to transitory actions. *Casey v. Adams*, 102 U. S. 66.

48. Where one is sued by a national bank for money lent, he cannot set up as a bar that the amount exceeded one-tenth part of the capital stock of the bank actually paid in, although the act of 1864 provides that the liability of any person to such a bank shall not exceed such amount. *Union Gold-Mining Co. v. Rocky Mountain National Bank*, 96 U. S. 640.

49. Section 5201, Rev. Sts., which prohibits a national bank from making loans on the security of shares of its own capital stock, imposes no penalty for a violation of the law. If such a loan be made, and, under the contract with the borrower, the bank sell the shares and credit the borrower with the proceeds, the courts will not aid him to recover them. *Xenia First National Bank v. Stewart*, 107 U. S. 676.

50. Notwithstanding the implied prohibition in the national banking act, Rev. Sts. §§ 5136, 5187, of the lending of money by national banks on real-estate security, no one other than the government can question the validity of such a transaction. [MILLER, J., dissenting, holding the loan prohibited and the security, therefore, void.] *Union National Bank v. Matthews*, 98 U. S. 621; *Genesee National Bank v. Whitney* [MILLER and HARLAN, JJ., dissenting], 103 U. S. 99; *Swope v. Leffingwell*, 105 U. S. 3; *Reynolds v. Crawfordville First National Bank*, 112 U. S. 405; *Fortier v. New Orleans National Bank*, 112 U. S. 439.

51. — *Taxation of Shares — Rate — Limitation — Equality, etc., necessary.*] By the act of 1864 the shares of national banking associations are subject to state taxation, under the limitations of section 41, whether the whole or any part of the capital thereof is invested in na-

**NATIONAL BANK — continued.**

tional securities exempt from such taxation, or not. [CHASE, C. J., and WAYNE and SWAYNE, JJ., dissenting.] *Van Allen v. Assessors*, 3 Wal. 573; *People v. Commissioners*, 4 Wal. 244; *Louisville First National Bank v. Kentucky*, 9 Wal. 353.

52. But a state statute which, in taxing such shares, fails — *e. g.*, like the New York statute of March 9, 1865 — to provide that the rate of the tax imposed shall not exceed that of the tax imposed on shares of the state banks, there being no tax on such shares, but only one on capital, is unwarranted and void. *Van Allen v. Assessors*, 3 Wal. 573. And see *Bradley v. People*, 4 Wal. 459; *People v. Tax Commissioners*, 94 U. S. 415.

53. In New York, under the statute of 1866, shares of stock in a national bank are assessable at their actual value, although at more than par value; and this, notwithstanding the statute of 1865, providing otherwise, that statute having been pronounced void. *People v. Tax Commissioners*, 94 U. S. 415.

54. That clause of the first proviso of section 41 of the national banking act, which restricts state taxation of such shares to the rate "assessed upon other moneyed capital in the hands of individual citizens," means by moneyed capital such moneyed capital as is subject to taxation. *People v. Commissioners*, 4 Wal. 244. See also *Adams v. Nashville*, 95 U. S. 19.

55. It does not prohibit the assessment of such shares at an amount above their par value. *Hepburn v. School Directors*, 23 Wal. 480.

56. Nor because "mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate" are exempt from taxation in a certain county, except for state purposes, are shares in a national bank located in the county exempt from municipal or school taxes. *Ib.* See also *Adams v. Nashville*, 95 U. S. 19.

57. The exemption from county taxation of property considerable in quantity and value, consisting of railroad securities, shares of stock in corporations liable to state taxation, mortgages, judgments, recognizances, money due on contracts for the sale of land and corporation loans taxable by the state, constitutes an unlawful discrimination against national bank shares, the discrimination being substantial. *Boyer v. Boyer*, 113 U. S. 689.

58. A state statute, like the New York statute of April 23, 1866, which, while permitting one to deduct the amount of his indebtedness from the valuation of his personal property for purposes of taxation, refuses him the privilege, so far as such property consists of national bank shares, in effect, taxes such shares at a greater rate than other moneyed capital, and is, therefore, void as conflicting with § 5219, Rev. Sts. *People v. Weaver*, 100 U. S. 539.

59. The collection of a state tax on the shares of a national bank will not be enjoined where it

**NATIONAL BANK — continued.**

does not appear that there is any statutory discrimination against them, or that under any rule established by the assessing officers they are rated higher in proportion to their actual value than other moneyed capital. It is not enough that assessments may be unequal and partial, and that some other property is rated at less than such shares. *German National Bank v. Kimball*, 103 U. S. 732.

60. Section 41, in providing that the state taxes on shares in national banks "shall not exceed the rate imposed" on shares in "any of the banks organized under the authority of the state," does not preclude a state from taxing them at a rate higher than that to which in taxing certain state banks of issue the state by contract with those banks is limited, the rate not being higher than that at which shares in all the other state banks and corporations are taxed, it being intended only that the states shall tax shares in their own banks at the same rate, only so far as they have the capacity. *Lionberger v. Rouse*, 9 Wal. 468.

61. The state banks had in contemplation by that section were banks of issue. *Ib.*

62. A statute which lays a tax on bank stock of "fifty cents on each share" equal to one hundred dollars, or on "each one hundred dollars of stock," is a tax on shares as distinguished from capital invested in government securities; and this, although the tax is to be collected directly of the bank. *Louisville First National Bank v. Kentucky*, 9 Wal. 353.

63. A state law requiring national banks, instead of their stockholders, to pay a tax on shares therein, is not invalid as being legislation affecting an instrument of federal government, the doctrine forbidding such legislation being founded only on the necessity of the government for the use of such instruments, and so not reaching legislation which does not impair their usefulness. *Ib.*; *Lionberger v. Rouse*, 9 Wal. 468.

64. So a state, for the purposes of taxation, may require, under a penalty, cashiers of national banks to transmit, on or before a certain date, to the clerks of towns in which stockholders live, a list of such stockholders, together "with the amount actually paid in" on each share. The ground of such an act is not covered by congress by an enactment requiring lists of stockholders to be posted in the offices of such banks. *Waite v. Dowley*, 94 U. S. 527.

65. There is nothing in the requirement of a state constitution that taxation shall be uniform which renders invalid a statute requiring shares of national banks owned by shareholders resident in the state to be assessed for taxation at the place of the location of the bank elsewhere than at the place of the shareholder's residence. *Tappan v. Merchants' National Bank*, 19 Wal. 490.

66. National bank stock, although in a sense intangible and incorporeal, may have, and under

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section 41 of the national banking act does have, a situs for the purposes of taxation separate from that of its owner; and a state in which such a bank is located has jurisdiction for such purposes of all shareholders and shares, and, state constitution apart, power to legislate in accordance with that act. *Ib.*

67. The personal property of an insolvent national bank in the hands of a receiver appointed by the comptroller of the currency, pursuant to § 5234, Rev. Sts., is exempt from taxation under state laws; such property, in legal contemplation, still belongs to the bank. *Rosenblatt v. Johnston*, 104 U. S. 462.

68. Although the constitution and statutes of a state provide for the valuation of all moneyed capital, including shares of the national banks at its true cash value, a federal court will enjoin the collection of a tax assessed on such shares, where, through systematic undervaluation of other property, such shares are not fairly assessed; and especially is an injunction properly granted where the statutes of the state provide for that remedy in the case of illegal assessments. [WAITE, C. J., dissenting, on the ground that, as the state law provided for a uniform valuation, an injunction should not be granted on the ground of inequality thereof; — that the valuation should be deemed conclusive.] *Pelton v. Commercial National Bank*, 101 U. S. 143; *Cummings v. Merchants' National Bank*, *Id.* 153.

69. And where a bank is required to pay taxes assessed on shares, withholding the amounts so paid from dividends due shareholders, if an illegal assessment is made, the remedy of the bank by action to recover back the amount after payment is not plain, adequate, and complete, so as to preclude the bank from applying for an injunction; even did not the state statute expressly recognize the right to demand an injunction to restrain an illegal levy. *Cummings v. Merchants' National Bank*, 101 U. S. 153.

70. Where a tax is illegally assessed on bank shares under statutes requiring the banks to report the facts necessary to an assessment, and to pay the tax, deducting the amount from dividends due the shareholders, proceedings to procure an injunction against the collection of the tax are properly brought by the bank; they need not necessarily be brought by the shareholders. *Ib.* And see *Hills v. National Albany Exchange Bank*, 105 U. S. 319.

71. While a state has no right to tax shareholders in national banks without permitting them to deduct their debts from the value of their shares, a deduction being permitted in the case of all other personal taxable property, the validity of a statute making such discrimination cannot be questioned by a shareholder who has no debts to deduct, or who has not notified the assessing officers that he claims the right to make the deduction. As to him the statute is valid. [BRADLEY, J., dissenting, holding such a statute

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void in toto.] *Albany County Supervisors v. Stanley*, 105 U. S. 305; *Hills v. National Albany Exchange Bank*, Id. 319.

72. Where, however, it is clear that a demand for a deduction would have been disregarded and unavailing, such demand need not be shown. *Hills v. National Albany Exchange Bank*, 105 U. S. 319.

73. A statute which, instead of allowing a deduction of debts from personal property generally, permits it from "credits" only, is open to the same objection. [WAITE, C. J., and GRAY, J., dissenting.] *Evansville National Bank v. Britton*, 105 U. S. 322.

74. — *Usury — What constitutes — Effect.* Under § 30, act of 1864, which permits national banks to take interest at the rate allowed by the state laws, and no more, except where the state laws give a different limit for state banks, when the rate so limited shall be allowed, a national bank may take at the rate permitted in the state generally, where the state banks are limited to a lower rate. *Tiffany v. Missouri National Bank*, 18 Wal. 409.

75. Under that section, the only forfeiture incurred is a forfeiture of the entire interest; and no forfeiture of the debt can be enforced under a state usury law, such banks being instruments of the government, and independent of state control. *Farmers' & Mechanics' National Bank v. Dearing*, 91 U. S. 29.

76. In a state where the transfer by the payee of a negotiable note at a discount beyond the lawful rate of interest is not deemed usurious, such a transaction, where a national bank is the transferee, and where the indorsement imposes the ordinary liability on the indorsee, is, nevertheless, within the inhibition of the statute, and twice the amount of interest taken in excess of the legal rate is recoverable in an action of debt from the bank so taking it. *Gloversville National Bank v. Johnson*, 104 U. S. 271.

77. The forfeiture, however, cannot be enforced otherwise, *e. g.*, by way of set-off in a suit by the bank on the last of a series of bills on which the interest is taken. *Barnet v. Muncie National Bank*, 98 U. S. 555; *Stephens v. Monongahela National Bank*, 111 U. S. 197.

78. And it makes no difference whether the set-off is asserted by the principal who paid the usurious interest or by a surety. *Stephens v. Monongahela National Bank*, 111 U. S. 197.

79. Where the laws of the state permit the purchase of *bona fide* bills of exchange at not more than the current rate of exchange in addition to the interest, one sued on a bill by such a bank cannot defend on the ground of usury, where there is no proof of the current rate of exchange. *Wheeler v. Union National Bank*, 96 U. S. 268.

80. Usurious interest paid to a national bank on renewal of a series of notes cannot, in an action by the bank on the last of them, be applied

**NATIONAL BANK — continued.**

in satisfaction of the principal of the debt. *Driesbach v. Second National Bank*, 104 U. S. 52.

81. The act does not declare the contract under which a national bank takes usurious interest void, and the court cannot so hold it. *Oates v. Montgomery First National Bank*, 100 U. S. 239.

82. — *Criminal Liability of Officials under Rev. Sts. § 5209.* An indictment under § 5209, Rev. Sts., which makes it a misdemeanor for an officer of a national bank to make a false entry in a book of the bank with intent to injure or defraud the bank or any agent appointed to examine its affairs, is not defective in omitting an averment that the false entry was made in an account, and in the due course of business of the bank, the indictment pointing out with certainty and precision the book in which the entry was made, as, *e. g.*, the book known as "profit and loss, number six." *United States v. Britton*, 107 U. S. 655.

83. Nor is the indictment defective, because the entries set out might be unintelligible to persons not skilled as accountants. *Ib.*

84. Nor, the false entry set forth consisting of a credit to profit and loss of interest entered as paid by a person named, because it does not aver that interest was due from that person. *Ib.*

85. Nor because the falsity of such an entry as that set forth might readily be discovered by a bank examiner. *Ib.*

86. Nor for want of an averment that at the time the false entry was made an agent had been appointed to examine the affairs of the bank, the language of the act applying as well to an agent to be appointed as to one already appointed. *Ib.*

87. Nor because it charges the intent to be to injure and defraud the bank, it being possible to injure and defraud the bank by false entries in its account of profit and loss. *Ib.*

88. The provision of § 5209, Rev. Sts., making it a misdemeanor for the president of a national bank wilfully to misapply the bank's money with intent to injure or defraud the bank or any person, does not embrace conduct which amounts to a maladministration of the bank's affairs rather than to a criminal misapplication of its funds; as, for instance, a purchase of shares of the bank for its use, and not for his own use nor for the use of any other person. *Ib.*; *United States v. Britton*, 108 U. S. 192.

89. An indictment under that section charging such a purchase, without further averments, is bad for repugnancy. *Ib.*

90. And bad, also, for failing to aver that the purchase was made with intent to injure or defraud, such intent being made an essential ingredient of the offence. *Ib.*

91. Nor is it enough, in such an indictment, to aver, merely, that the money was "wilfully misapplied," this term having no settled technical meaning. *United States v. Britton*, 107 U. S. 655.



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92. Nor does an averment of the use of the money of the bank in the purchase of its shares import an offence, there being no averment that the purchase was not necessary to prevent a loss on a debt, the statute making such a purchase lawful in such case. *Ib.*

93. The president of a national bank does not violate § 5209, Rev. Sts., which forbids the president of such a bank wilfully to misapply the bank's funds, by procuring the discount of a note not well secured, and the maker and indorsee of which he knows to be insolvent, although he applies the money to his own use, nor by permitting a depositor largely indebted to the bank to withdraw his deposit without first paying his indebtedness. *United States v. Britton*, 108 U. S. 193.

94. Nor can an indictment be maintained under section 5204 against two or more directors who procure the declaration of a dividend where there are no net profits to pay it. Such an act does not constitute a conspiracy to defraud the bank or to commit an indictable offence. *United States v. Britton*, 108 U. S. 199.

95. A notary public, holding his commission from a state, had no authority, prior to the passage of the act of February 26, 1881 (21 Sts. 352), to administer to a cashier of a national bank the oath necessary to verify the report to the comptroller of the condition of the bank, required by § 5211, Rev. Sts. An indictment for perjury, therefore, could not be predicated on a false statement contained in such a report and verified before such an officer. *United States v. Curtis*, 107 U. S. 671.

*Insolvency — Government's Right to Preference.*

See UNITED STATES — PRIORITY OF PAYMENT, 29.

*Judgment against Cashier under State Law — Right of Bank to buy Note secured by Mortgage — Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 95, 96.

*Receiver cannot submit Government to Jurisdiction of the Courts.*

See UNITED STATES — SUITS, 23.

*Suits by and against, in Circuit Court — When brought.*

See CIRCUIT COURT — JURISDICTION, 45.

*Tax on Stock — Erroneous Assessment — Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 154.

**NATURALIZATION — Power — Requisites — Effect — Effect on Power to hold Lands, etc.]**  
The power of naturalization is exclusively in congress. *Chirac v. Chirac*, 2 Wheat. 259.

2. Administration of the oath of allegiance under the naturalization act of January 29, 1793 (1 Sts. 414), held to amount to a judgment of

**NATURALIZATION — continued.**

the court for the admission of the applicant to the rights of a citizen, and an implication of compliance with all prerequisites thereto. *Campbell v. Gordon*, 6 Cranch, 176.

3. The judgment of a court of competent jurisdiction admitting an alien to citizenship is conclusive as to compliance with prerequisites. *Stark v. Chesapeake Insurance Co.*, 7 Cranch, 420.

4. Under the naturalization act of April 14, 1802, § 2 (2 Sts. 153), it was not necessary that an alien should report five years before applying for naturalization. *Spratt v. Spratt*, 4 Pet. 393.

5. Although under that act the report was evidence of the time of arrival, it was not the only evidence admissible. *Ib.*

6. The decree thereunder, in due form, was conclusive evidence of legal naturalization. *Ib.*

7. The minor child of a father duly naturalized before the passage of that act became a citizen, if within the United States at the time of its passage, although not there at the time of such naturalization. *Campbell v. Gordon*, 6 Cranch, 176.

8. The act of July 14, 1870 (16 Sts. 254), to amend the naturalization laws, repeals by implication section 13 of the act of March 3, 1813 (2 Sts. 809), relating to forging certificates of citizenship. *United States v. Tynen*, 11 Wal. 88.

9. Under the act of February 10, 1855 (10 Sts. 604), providing that any woman who might be naturalized under existing laws, "married, or who should be married," should be deemed a citizen, a woman by being in or coming into the state of marriage with a citizen thereby is or becomes herself a citizen, if she might be naturalized under previous acts, the object of the act being to allow the citizenship of the wife to follow that of the husband without necessity for formal naturalization on her part. *Kelly v. Owen*, 7 Wal. 496.

10. The act extended to all free white women, as the act of 1802, the naturalization act then in force, permitted the naturalization of all such. *Ib.*

11. An alien who becomes naturalized may hold land acquired before his naturalization. *Gouverneur v. Robertson*, 11 Wheat. 332.

12. Alienage being proved, the fact that the alien acquired, and long held, real estate, without proceedings for forfeiture, held, in the circumstances, not sufficient ground for presuming that he became a citizen by taking an oath of fidelity in a court of record. *Blight v. Rochester*, 7 Wheat. 535.

*In general.*

See ALIEN, 21-23.

**NAVIGATION — Congress — Power over.**

See COMMERCE.

*Inland — What Navigation is.*

See SHIPPING — LIMITATION OF LIABILITY, 9.

**NAVIGATION — continued.**

*Navigable River — What is.*

See *COMMERCE*, 20 *et seq.*

*Navigable Waters — Power of Congress and of States over.*

See *COMMERCE*.

*Navigable Waters — Rights of States and United States thereto.*

See *WATERS*.

*States — Power over.*

See *COMMERCE*.

*Warehouse a Proper Adjunct — Erection at a Landing on the Mississippi River.*

See *WATERS*, 30.

**NAVY — Regulations — Power of Commander — Duty of Purser — Pay and Emoluments — Dismissal from Service — Commitment by the President — Texas Navy, etc.]** The "regulations for the administration of law and justice in the navy," established by the secretary of the navy with the approval of the president, have the force of law. *Ex parte Reed*, 100 U. S. 13. And see *Gratiot v. United States*, 4 How. 80.

2. The commander of a public armed vessel on duty in a foreign port has a right to determine whether a marine under his command is entitled to a discharge by reason of the expiration of the period for which he enlisted, and his decision is, for the time being, conclusive. *Dinsman v. Wilkes*, 12 How. 390.

3. Refusal of the marine to submit to that decision and do duty is insubordination for which he may be punished. *Ib.*

4. If the commander, in the honest exercise of his judgment, believe it proper to confine the marine on shore, he may do so. *Ib.*

5. *Prima facie*, the commander of a public armed vessel who causes such punishment as he has lawful power to inflict, to be inflicted on one of his crew, may justify, by proving the case to be within such power. *Wilkes v. Dinsman*, 7 How. 89.

6. But if the punishment inflicted be in any way aggravated by malice or passion on the part of the commander, he is liable. *Ib.*; *Dinsman v. Wilkes*, 12 How. 390.

7. Instructions from the president to the commander of a public armed vessel of the United States to do an illegal act do not justify him in doing it, nor so far excuse him as to relieve him from payment of damages therefor. *Little v. Barreme*, 2 Cranch, 170.

8. A purser in the navy has no right to a commission for drawing bills of exchange abroad to procure the funds which he disburses, there being no usage to allow it. *United States v. Buchanan*, 8 How. 83.

9. Nor to extra compensation for paying mechanics and laborers at a navy yard, that being an official duty. *Ib.*

10. Since the act of August 26, 1842 (5 Sts.

**NAVY — continued.**

535), if not before, pursers in the navy may be directed to make purchases of supplies on public account, and to disburse any moneys for the use of the navy, as appropriated by law. *Strong v. United States*, 6 Wal. 788.

11. A passed assistant-surgeoncy is an office, and the notification of the secretary of the navy is a valid appointment to it. *United States v. Moore*, 95 U. S. 760.

12. A regularly appointed clerk of a paymaster in the navy is a "person in the naval service" within the meaning of art. 14, § 1624, Rev. Sts., and may be tried by court-martial. *Ex parte Reed*, 100 U. S. 13.

13. The words, "after date of appointment" and "from such date," in § 1556, Rev. Sts., fixing the annual pay of passed assistant-surgeons of the navy, refer, not to the original entry of the officer into the service as an assistant-surgeon, but to the notification by the secretary of the navy that he has passed his examination for promotion to the grade of surgeon, and, until promoted, will be considered as a passed assistant-surgeon. *United States v. Moore*, 95 U. S. 760.

14. The act of June 30, 1876 (19 Sts. 65), repealing the provision of the act of June 16, 1874 (18 Sts. 72), which declares that only actual travelling expenses shall be allowed persons holding employment or appointment under government, so far as such provision is applicable to officers of the navy, and providing that "the sum of eight cents per mile shall be allowed such officers so engaged in lieu of their actual expenses," makes no distinction between travel by land and travel by sea when performed by such an officer on public business. *United States v. Temple*, 105 U. S. 97.

15. Before the passage of the act of 1882, a naval officer, under the act of March 3, 1835 (4 Sts. 757), was entitled to ten cents per mile travel pay, while travelling either within or without the United States, and was not limited to actual travelling expenses for travel without the United States, although the executive department has for forty years made such a distinction. *United States v. Graham*, 110 U. S. 219.

16. There is nothing in Rev. Sts. §§ 1556, 1588, or elsewhere, which, either expressly or by implication, gives longevity pay to naval officers on the retired list. *Thornley v. United States*, 113 U. S. 310; *Brown v. United States*, Id. 568.

17. Nothing in the act of July 15, 1870 (16 Sts. 321), shows any intention to abolish the furlough pay-list of the navy. *Brown v. United States*, 113 U. S. 569.

18. The act of August 3, 1861 (12 Sts. 291), providing for the retirement of officers of the navy, while not, in terms, embracing warrant officers, should be deemed to include them. *Ib.*

19. Where a retiring board retires a navy officer on furlough pay, not reporting the cause of his incapacity, but only that there is no evi-

**NAVY — continued.**

dence that it resulted from any incident of the service, this is equivalent to a finding that the incapacity was not the result of an incident of the service, and justifies a retirement on furlough pay. *Ib.*

20. And if it did not, the acquiescence of the officer during life precludes his personal representative from claiming that there was an irregularity. *Ib.*

21. Whether, in June, 1866, the secretary of the navy had power summarily to dismiss an officer from the service in time of war, or not, the subsequent nomination by the president and confirmation by the senate of another officer in the place of an officer so dismissed operated to remove him from the service. The power, if not otherwise possessed by the president, was given by the act of June 17, 1862 (12 Sts. 597); and the act of July 13, 1866, § 5 (14 Sts. 92), providing that no officer should be dismissed in time of peace, except on the sentence of a court-martial, or in commutation thereof, did not become operative until August 20, 1866, the day on which peace was restored. *McElrath v. United States*, 109 U. S. 426.

22. The president, as commander-in-chief, has authority to direct a commitment in accordance with the sentence, of one duly convicted of an attempt to desert from the navy, and sentenced to imprisonment in the jail of the District of Columbia. *Dynes v. Hoover*, 20 How. 65.

23. The joint resolution of March 1, 1845 (5 Sts. 797), for the annexation of Texas, in stipulating for a cession of the Texan navy, did not make the officers of that navy officers in the federal naval service; it contemplated ships, their equipment, etc., only. *Brashear v. Mason*, 6 How. 92.

*Agent who has paid Claims for Purser — Claim.*

See RECEIVERS OF PUBLIC MONEY, 2.

*Commander of Squadron — Liability for Acts of those under his Command.*

See CAPTURE — CAPTOR'S DUTIES, ETC., 10, 11.

*Marine Corps — In general.*

See MARINE CORPS.

*Pay of those serving during Mexican War.*

See ARMY, 21.

*Prize-money — Right of Naval Vessel and Officers thereto.*

See CAPTURE — CAPTOR'S RIGHTS, ETC., 7.

*Purser — Liability of Sureties — Of Paymaster.*

See RECEIVERS OF PUBLIC MONEY, 3, 4.

**NAVY DEPARTMENT — Powers of Secretary.]**

Where the secretary of the navy has power to make a contract for the construction of vessels of war, the power necessarily exists to agree upon a proper compensation for the part performance of

**NAVY DEPARTMENT — continued.**

such a contract, when further performance is suspended by his order; and a settlement agreed upon by him is binding on the government, neither fraud nor mistake appearing. *United States v. Corliss Steam-Engine Co.*, 91 U. S. 321.

*Contracts to be in Writing.*

See WAR DEPARTMENT.

*Mandamus to compel Secretary to pay Naval Officer.*

See MANDAMUS, 20.

*Power of Secretary to dismiss Officer from Service in Time of War.*

See NAVY, 21.

*Regulations by Secretary for Administration of Justice have Force of Law.*

See NAVY, 1.

**NEBRASKA** — *County not a Corporation within the Meaning of the State Constitution.*

See COUNTY, 1.

**NECESSITY** — *What will justify Master in selling Vessel and Cargo.*

See SHIPPING — MASTER, 1 et seq.

**NEGLECT** — *What constitutes — Contributory Negligence — Proximate Cause — Statutory Action for Negligence causing Death — Question for Jury.* The theory of the three degrees of negligence examined. *The New World v. King*, 16 How. 469.

2. The distinction between different kinds of negligence criticised, and declared to refer to that which would be more accurately expressed by way of a distinction between the degrees of care and diligence which one should exercise. *New York Central Railroad Co. v. Lockwood*, 17 Wal. 357.

3. "Gross negligence," — what is, considered. *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U. S. 489.

4. If an employment require skill, failure to exert it is culpable negligence, for which an action lies. *The New World v. King*, 16 How. 469.

5. In an action for personal injury caused by negligence, the degree of caution, want of which will be contributory negligence, depends on the maturity and capacity of the person, and will be less where the person is an infant of tender years than where he is an adult. *Washington & Georgetown Railway Co. v. Gladmon*, 15 Wal. 401; *Sioux City & Pacific Railroad Co. v. Stout*, 17 Wal. 657.

6. In general, and independently of statute, contributory negligence is matter of defence. *Washington & Georgetown Railway Co. v. Gladmon*, 15 Wal. 401.

7. Where, in an action brought to recover for injuries received from a railroad accident, the plaintiff's evidence does not tend to establish contributory negligence on his part, the court may properly charge that the burden of proving

**NEGLIGENCE — continued.**

contributory negligence rests on the defendant, and that he must establish it by a preponderance of evidence. *Indianapolis & St. Louis Railroad Co. v. Horst*, 93 U. S. 291.

8. If one become insane from injuries received from a railroad accident, and eight months after the accident, while thus insane, take his own life, the accident cannot be deemed the proximate cause of his death, and therefore the railroad company cannot be held liable for the death. *Scheffer v. Washington City, Virginia, Midland, & Great Southern Railroad Co.*, 105 U. S. 249.

9. The question of what is the proximate cause of an injury is ordinarily a question for the jury; as, for instance, the question whether the burning of a mill resulted proximately from the burning of an elevator some distance away; and a finding that the burning of the mill was caused by the negligent burning of the elevator, and was the unavoidable consequence thereof, is, in effect, a finding that there was no intervening independent cause. *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U. S. 469.

10. Where a statute gives a right of action to the personal representatives of a person killed by an act such as, but for his death, would have given him a remedy for the injury, the action to be prosecuted for the use of the widow and next of kin, and the proceeds to be distributed as in an ordinary case of intestacy, it is not necessary that a claim on the deceased for support or any pecuniary interest in his life should be shown. *Illinois Central Railroad Co. v. Barron*, 5 Wal. 90.

11. Where the question of negligence is in issue, it is for the court to say whether any facts have been established from which negligence can be fairly inferred; and for the jury to say whether from the facts submitted to them negligence ought to be inferred. *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478.

12. Whether a passenger in a railway car is negligent in standing while the train is moving into a station, and before the car has actually stopped, is a question for the jury under proper instructions. *New Jersey Railroad Co. v. Polard*, 22 Wal. 341.

*Action therefor — Injury received on Sunday.*  
See SUNDAY, 1.

*Attorney — In general.*  
See ATTORNEY, 26, 27.

*Bank, as Agent for Collection.*  
See BANK, 28 et seq.

*Carrier — In general.*  
See CARRIER.

*Contributory Negligence.*  
See MASTER AND SERVANT, 10, 14.

*Damages — Measure of, in Cases of Negligence.*  
See DAMAGES, 27 et seq.

**NEGLIGENCE — continued.**

*Loss by Fire caused thereby covered by Insurance.*

See INSURANCE — FIRE, 24.

*Master and Servant — When Master is liable — When Servant.*

See MASTER AND SERVANT.

*Postmaster — Negligence in forwarding Letter — Evidence.*

See POST-OFFICE, 3, 4.

*Railroad Companies in running of Trains, etc.*  
See RAILROAD — COMPANY, 5 et seq.

*Ship-owner — Liability for Negligence of Officers or Agents.*

See SHIPPING — LIMITATION OF LIABILITY, 10, 13.

*Tugs and Boats performing Contracts for Towing.*

See TUGS AND TOWAGE.

*Vessels — In general.*

See COLLISION.

**NEGOTIABLE INSTRUMENT — What constitutes — When due.]** A certificate of public debt, transferable only by the owner or his legal attorney or representative, on the books of the stock commissioner, indorsed in blank to an agent for a special purpose, and by such agent sold, is not a negotiable instrument within the rule governing the rights of a *bona fide* indorsee for value of a negotiable instrument. *Combs v. Hodge*, 21 How. 397.

2. Negotiable paper payable on demand is not due without demand until after the lapse of a reasonable time within which to make demand; and what is reasonable time in which to make demand depends on circumstances, *e. g.*, the intention of the parties and the purposes for which the paper was created and put in circulation. *Morgan v. United States*, 113 U. S. 476.

*Bill of Lading — In general.*  
See BILL OF LADING.

*Bills and Notes — Particular Kinds of Negotiable Instruments.*

See BILLS AND NOTES; CHECKS, ETC.

*Bond originally non-negotiable becomes a Negotiable Instrument on being made by a Subsequent Indorsement payable to Bearer.*

See CIRCUIT COURT — JURISDICTION, 99.

*County Warrants not negotiable.*  
See COUNTY, 12.

*Government Bonds, Treasury Notes, etc., in general.*

See GOVERNMENT BONDS.

*Municipal Bonds — In general.*

See MUNICIPAL BONDS; MUNICIPAL CORPORATION.

*Municipal Corporations — Power to issue Negotiable Paper.*

See MUNICIPAL CORPORATION — FISCAL POWERS, 13-16, 58.

**NEGOTIABLE INSTRUMENT** — *continued.*

*Party incompetent to impeach.*

See *ESTOPPEL*, 9.

*Railroad Bonds — In general.*

See *RAILROAD — MORTGAGE*, 16 *et seq.*

*State Bonds — In general.*

See *STATE BONDS*.

**NEGRO** — *Citizenship under the Constitution.*

See *CITIZEN*, 2; *CIVIL RIGHTS*.

**NEMO ALLEGANS SUAM, ETC.** — Not a rule of evidence, but a rule applying to parties seeking to enforce rights founded on illegal or criminal considerations. See *Davis v. Brown*, 94 U. S. 423, per *FIELD*, J.

**NEUTRAL** — *Contraband — Conveyance by, unlawful.*

See *CONTRABAND*, 4.

*Contraband — Rights of Neutral.*

See *WAR*, 17 *et seq.*

*Property in Enemy's Country — Removal — Vessel in Belligerent Control.*

See *CAPTURE — LAWFUL PRIZE*.

*Property — Liability to Capture.*

See *CAPTURE — LAWFUL PRIZE*.

*Right in Navigable River, one Bank of which it occupies.*

See *BLOCKADE*, 4.

**NEUTRALITY** — *What constitutes a Breach — Selling Armed Vessels to Foreign Powers — Augmentation of Force of Foreign Vessel — Fitting out Vessel to cruise against Powers at Peace with United States.* It is not a violation of the neutrality laws of the United States to sell to a foreigner a vessel built in this country, although suited to privateering and having some equipments calculated for war but frequently used by merchant ships. *Moodie v. The Alfred*, 3 Dal. 307.

2. The mere replacement of the guns of a foreign privateer in a neutral port is not an augmentation of her force. *Moodie v. The Phæbe Anne*, 3 Dal. 319. And see *Geyer v. Michel*, 3 Dal. 285.

3. A substantial increase of the crew of a foreign belligerent vessel in one of our ports, we being neutral, is a breach of our neutrality. *The Santissima Trinidad*, 7 Wheat. 283.

4. A vessel armed and manned in one of our ports, and sailing thence to a belligerent port, with intent thence to sail on a cruise with such crew and armament, and so departing, and capturing belligerent property, violates our neutrality. *The Gran Para*, 7 Wheat. 471.

5. Under the act of April 20, 1818 (3 Sts. 448), to convict on an indictment for being concerned in fitting out a vessel with intent, etc., it is not necessary to prove that the vessel was armed, or in a condition to commit hostilities,

**NEUTRALITY** — *continued.*

on leaving the United States. It is enough to show that the defendant was knowingly concerned in fitting out or arming the vessel with the unlawful intent, although that intent was defeated after the vessel sailed. *United States v. Quincy*, 6 Pet. 445.

6. But if, when the vessel sailed, the defendant had no fixed intention to employ her as a privateer, but only a wish so to employ her if, on her arrival in a foreign port, he could obtain funds for the purpose of arming her, he is not guilty. *Ib.*

7. Under the act of June 14, 1797 (1 Sts. 520), it was unlawful for citizens of the United States to cruise against Spain under a commission from one of the new South American states. *The Bello Corrunes*, 6 Wheat. 152; *The Conception*, *Id.* 235.

8. Forfeiture under the neutrality act of June 5, 1794 (1 Sts. 381), attaches at the moment of the commission of the offence. *Gelston v. Hoyt*, 3 Wheat. 246.

9. Section 7 of that act does not authorize the president to employ civil officers to make seizures. *Ib.*

10. A pretended foreign state, as yet unrecognized by our government or the government to which such new state belonged, is not "any foreign prince or state," within the meaning of that act. *Ib.*

*Forfeiture under Act of 1793 — Who may seize — Pleading.*

See *SEIZURE*, 3, 5.

*Representations concerning, as affecting Contract for Marine Insurance.*

See *INSURANCE — MARINE*, 13 *et seq.*

*Restitution of Captures in Violation, etc.*

See *CAPTURE — RESTITUTION*, 3 *et seq.*

*Warranty in Contract of Insurance — What constitutes — Breach.*

See *INSURANCE — MARINE*, 47 *et seq.*

**NEW JERSEY** — *Boundary between, and New York.*

See *STATES — BOUNDARIES*, 7.

*Boundary between, and Staten Island.*

See *ADMIRALTY — JURISDICTION*, 43.

*Grant from the Crown — Extent.*

See *WATERS*, 1.

**NEW ORLEANS** — *Public Quays — Regulation.*

Under the laws either of France or of Spain, the crown, although having the power to regulate the public use of such places as the public quays in New Orleans, had no right to destroy it, save by an exercise of the right of eminent domain. *New Orleans v. United States*, 10 Pet. 662.

*Dedication of Public Quays — Right of Public. how affected.*

See *DEDICATION*, 10, 11.

**NEW PROMISE** — Statute Limitations — What Promise sufficient, etc.

See LIMITATION — EXCEPTIONS AND INTERRUPTIONS, 68 *et seq.*

**NEW TRIAL** — What constitutes — When granted — Matter of Discretion.

See pl. 1-5.

For what granted — Misconduct of Jury — Admission of Evidence — Erroneous Instruction — Verdict against Evidence.

See pl. 6-13.

Motion — Effect — Not a Waiver of Writ of Error.

See pl. 14.

1. — What constitutes — When granted — Matter of Discretion.] An award of a *venire de novo* is nothing more than an order for a new trial in a cause in which the verdict or judgment is erroneous in matter of law. It is never equivalent to a new suit. *United States v. Hawkins*, 10 Pet. 125.

2. The granting or refusing of a new trial is matter of discretion, and not assignable for error. *Henderson v. Moore*, 5 Cranch, 11; *Marine Insurance Co. v. Young*, Id. 187; *Barr v. Gratz*, 4 Wheat. 213; *Blunt v. Smith*, 7 Wheat. 248; *Zacharie v. Franklin*, 12 Pet. 151; *Doswell v. De la Lanza*, 20 How. 29; *Warner v. Norton*, 20 How. 448; *Pomeroy v. Indiana State Bank*, 1 Wal. 592; *Freeborn v. Smith*, 2 Wal. 160; *Laber v. Cooper*, 7 Wal. 565; *Home Insurance Co. v. Barton*, 13 Wal. 603; *Mulhall v. Keenan*, 18 Wal. 342; *Cambuston v. United States*, 95 U. S. 285; *Kansas Pacific Railway Co. v. Twombly*, 100 U. S. 78; *Cairo & Fulton Railroad Co. v. Heck*, 102 U. S. 120; *Boogher v. New York Life Insurance Co.*, 103 U. S. 90; *Terre Haute & Indiana Railway Co. v. Struble*, 109 U. S. 381.

3. The rule applies to an order of a local appellate court affirming an order of the local inferior court refusing a new trial. *Sparrow v. Strong*, 4 Wal. 584.

4. Nothing in § 5, act of June 1, 1872 (17 Sts. 197), was intended to abrogate the rule. *Newcomb v. Wood*, 97 U. S. 581.

5. After the close of a term of the supreme court of the District of Columbia at which a final judgment was rendered on a verdict, and an appeal taken to the general term of the court, no bill of exceptions or case stated having been filed, a new trial cannot be granted on a case stated filed at a subsequent term by the justice before whom the trial was had. *Coughlin v. District of Columbia*, 106 U. S. 7.

6. — For what granted — Misconduct of Jury — Admission of Evidence — Erroneous Instruction — Verdict against Evidence.] A new trial should not be granted although some mistakes have been made, if, on the whole, the verdict be substantially right, and justice have

**NEW TRIAL** — continued.

been done. *McLanahan v. Universal Insurance Co.*, 1 Pet. 170.

7. Without laying down any general rule, the court, on the affidavits of two jurors, that while they were impanelled they read a newspaper report of the preceding evidence, but without effect upon their verdict, held that there was no ground for a new trial. *United States v. Reid*, 12 How. 361.

8. The only remedy for surprise in the introduction of evidence is by motion for a new trial. *Mulhall v. Keenan*, 18 Wal. 342.

9. A judgment in an action for personal injuries will be reversed where, the plaintiff being entitled to compensatory damages only, evidence was improperly admitted concerning his poverty and the number and ages of his children. *Pennsylvania Railroad Co. v. Roy*, 102 U. S. 451.

10. For the usurpation by the court of the functions of the jury in weighing evidence, a new trial will be granted. *Burdell v. Denig*, 92 U. S. 716.

11. A new trial will be ordered where the charge was vague and misleading, conveying to the jury the impression that opinions given by witnesses were competent evidence, and failing to give due effect to the facts of the case. *Loring v. Frue*, 104 U. S. 223.

12. The remedy of a party against whom a verdict has been given on insufficient evidence is a motion for a new trial. *Providence v. Babcock*, 3 Wal. 240.

13. In an action for money paid, where the defence was that the transactions were gambling contracts, and the defendant, in testifying in his own behalf, said that he could not say that he had an understanding that the contracts were gambling contracts, and there was no other evidence in the case tending to show that they were, a verdict for the plaintiff was not disturbed. *Roundtree v. Smith*, 108 U. S. 269.

14. — Motion — Effect — Not a Waiver of Writ of Error.] A motion for a new trial is not a waiver of a writ of error, and a rule making it such can have effect only by requiring the party to make the waiver a matter of record before the hearing of the motion. *United States v. Hodge*, 6 How. 279.

*Circuit Court may not grant one after Reversal above and Mandate directing Entry of Judgment.*

See APPEAL AND ERROR — PROCEEDINGS ON MANDATE, 4.

*Court of Claims — Review by Supreme Court.*

See SUPREME COURT — JURISDICTION, 78.

*Court of Claims — When granted — Mandamus to compel Allowance — Appeal.*

See COURT OF CLAIMS — PRACTICE, 9 *et seq.*

*Ejectment — Circuit Court — State Rule — Matter of Right.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 2.

**NEW TRIAL** — *continued.*

*Ejectment in Colorado* — *One New Trial as of Right.*

See EJECTMENT — PLEADING AND PRACTICE, 34.

*Granting or refusing New Trial* — *Matter of Discretion.*

See CASES CERTIFIED, 11.

*Motion for, not a Waiver of Exceptions.*

See EXCEPTIONS, 68.

*Motion* — *Pendency* — *Cause not removable* — *Nor Cause ordered to New Trial.*

See REMOVAL OF CAUSES, 99, 100, 103.

*Motion therefor only Remedy for a Finding Contrary to Instructions.*

See APPEAL AND ERROR — JURISDICTION, 3.

*Motion therefor not Mere Matter of Proceeding or Practice, and not within Meaning of Process Act of 1872.*

See FEDERAL COURTS — PRACTICE, 30.

*Replevin* — *When New Trial ordered.*

See REFLEVIN, 5.

**NEW YORK** — *Boundary between, and New Jersey.*

See STATES — BOUNDARIES, 7.

**NEWLY DISCOVERED EVIDENCE** — *Ground for New Trial.*

See NEW TRIAL.

**NEXT OF KIN** — *Meaning of the Term* — *Common Law.*

See DESCENT, 4.

**NIL DEBIT** — *Improper Plea in Action of Debt* — *When.*

See DEBT, 3.

**NOLLE PROSEQUI** — *Effect of, in Action on Bond.*

See BOND — ACTION, 23, 24.

**NON EST FACTUM** — *Proof in Support of the Plea* — *What sufficient.*

See APPEAL-BOND, 1.

**NON-JOINDER** — *Parties, etc.* — *In general.*

See PLEADING — DILATORY PLEAS.

**NON-RESIDENT** — *Defendants* — *Service on.*

See WRIT AND PROCESS.

**NONSUIT** — *Circuit Court* — *Power of, to order.*

See CIRCUIT COURT — PRACTICE, 9.

*Failure to produce Books in Evidence* — *When a Ground.*

See TRIAL — INTRODUCTION OF EVIDENCE, 41.

*Judgment not a Bar to Subsequent Action.*

See JUDGMENT — CONCLUSIVENESS, 127, 129.

**NORTH CAROLINA** — *Lands of the State* — *In general.*

See LANDS OF STATES — NORTH CAROLINA AND TENNESSEE.

**NORTHWESTERN TERRITORY** — *Titles of French Settlers.*

See LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS, 250.

*Title to Lands therein.*

See LANDS OF STATES — VIRGINIA AND KENTUCKY.

**NOTARY PUBLIC** — *Protest* — *What protects.]*

A protest in accordance with the law and practice of the place at which the bill is payable will protect the notary. *Wiseman v. Chiapella*, 23 How. 368.

*Competent to prove his Official Acts* — *When.*

See WITNESS — COMPETENCY, 5.

*Courts notice Seal.*

See EVIDENCE — JUDICIAL NOTICE, 20.

*Failure to perform Duty* — *When it does not operate to charge Employer.*

See BANK, 34.

*Power to administer Oath to Cashier of National Bank.*

See NATIONAL BANK, 95.

**NOTES** — *Promissory* — *In general.*

See BILLS AND NOTES.

**NOTICE** — *Acceptance of Guaranty* — *Guarantor's Right to Notice.*

See GUARANTY, 18 et seq.

*Affecting Capture.*

See CAPTURE — LAWFUL PRIZE.

*Agent* — *Notice to, when Notice to Principal.*

See AGENCY, 75.

*Appeal* — *Notice thereof, in general.*

See APPEAL — TAKING AND PERFECTING.

*Assignment* — *In general.*

See ASSIGNMENT.

*Attachment* — *Notice of Proceedings.*

See ATTACHMENT.

*Blockade* — *Institution* — *Discontinuance.*

See BLOCKADE, 8 et seq.

*Deed* — *Notice, actual and constructive.*

See DEED — REGISTRATION AND NOTICE.

*Dishonor* — *Notice to Indorser.*

See BILLS AND NOTES — INDORSEMENT, 63 et seq.

*Dissolution of Partnership* — *Notice, how given.*

See PARTNERSHIP, 88.

*Fraud affecting Conveyance.*

See FRAUDULENT CONVEYANCE.

*Judicial* — *What Courts will notice.*

See EVIDENCE — JUDICIAL NOTICE.

**NOTICE** — *continued.*

*Limitation thereby of Carrier's Liability.*

See CARRIER — DUTIES AND LIABILITIES, 24 *et seq.*

*Liquidation of Duties — Importer not entitled to Notice.*

See DUTIES — REMEDIES FOR ILLEGAL EXACTION, 10.

*Loss under Insurance Policy.*

See INSURANCE.

*Necessary, when, to Maintenance of Ejectment against one in Possession under Executory Contract of Sale.*

See EJECTMENT — IN GENERAL, 8.

*Produce Documents, etc., on Trial.*

See TRIAL — INTRODUCTION OF EVIDENCE, 31 *et seq.*

*Publication as Notice.*

See WRIT AND PROCESS.

*Purchaser — Notice of Prior Deeds, etc.*

See VENDOR AND PURCHASER — BONA FIDE PURCHASER, 7 *et seq.*

*Service of Process — In general.*

See WRIT AND PROCESS.

*Special Matter in Suit for Infringement of Patent.*

See PATENT — INFRINGEMENT, 110 *et seq.*

*Taking of Depositions.*

See DEPOSITION.

*Tax Sale — Notice in general.*

See TAX — COLLECTION, 9 *et seq.*

**NOTORIETY** — *Testimony of One Witness will not prove.*

See EVIDENCE — WEIGHT AND CONCLUSIVENESS, 5.

**NOVATION** — *Effect.*] If a novation be conditional, the original debt is not extinguished until it becomes absolute by performance of the condition. *Hyde v. Booraem*, 16 Pet. 169.

*What amounts to.*

See EXECUTION, 29.

**NOVELTY** — *Ground of Patent — In general.*

See PATENT — PATENTABILITY.

**NUDUM PACTUM** — *What constitutes, etc.*

See CONTRACT.

**NUISANCE** — *What constitutes — When Equity will interfere — Measure of Damages.*] That is a nuisance which annoys and disturbs one in the possession of property, rendering its ordinary use and occupation physically uncomfortable to him. The law, in such case, affords redress in damages; and it makes no difference that both parties are corporations. Thus, a religious corporation may maintain an action against a railroad company for the erection in a city of an engine-house

**NUISANCE** — *continued.*

and repair shop so near to the church building that the noise therefrom often renders it impossible for the preacher's voice to be heard, and the smoke and cinders often enter the church windows, to the great inconvenience and annoyance of the worshippers; and this, although the work of the company is done as quietly as possible, and the chimneys are higher than municipal regulations require, and although the company has authority to bring its track within the city limits and to construct works necessary and expedient for the completion and maintenance of the road, the authority conferred being impliedly conditioned upon such a placing of the works as will not interfere with the rights of others, and justifying no invasion of such rights without compensation. *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*, 108 U. S. 317.

2. A bridge across a navigable river cannot be treated as a nuisance, if by reason of a suitable draw it present no unreasonable obstruction to navigation. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518.

3. A bridge over a navigable river constructed in accordance with authority conferred by congress and by the legislature of the state — the bridge, for instance, over the East River between New York and Brooklyn — is a lawful structure, and cannot be deemed a public nuisance, however much it may interfere with the public right of navigation and thereby affect the business of private persons — warehouse keepers, for instance — on the banks of the river above the bridge. *Miller v. New York*, 109 U. S. 385.

4. A bill by an individual, praying for preventive relief, in a case of public nuisance, must aver, and must be supported by proof of, some special injury to the plaintiff. *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91; *Irwin v. Dixon*, 9 How. 10; *Miller v. New York*, 109 U. S. 385.

5. In trespass on the case for a nuisance, whether the effect of the thing complained of is to injure the plaintiff's property is a question for the jury. *Richardson v. Boston*, 19 How. 263.

6. A court of equity, although it may entertain a case of contract, fraud, or trust concerning land lying in another jurisdiction, cannot restrain, or give compensation for, a nuisance or tort to real property so situated. *Northern Indiana Railroad Co. v. Michigan Central Railroad Co.*, 15 How. 233.

7. Equity will interfere to enjoin a public nuisance at the suit of a person or corporation suffering irreparable injury therefrom. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518.

8. In case of a nuisance by means of an unlawful obstruction, as of a navigable river, an injured party may resort to equity, the damage being continuous and not provable and computable by items, and so not reparable at law. *Irwin v. Dixon*, 9 How. 10; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518.



**NUISANCE** — *continued.*

9. If equity be asked to remove a structure which is in fact a nuisance, it will not stop to inquire whether the benefits accruing to a portion of the public are equivalent to the resulting injuries. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518.

10. Courts of equity will enjoin private nuisances, in what cases. *Parker v. Winnipiseogee Lake Cotton & Woollen Manufacturing Co.*, 9 Black, 545.

11. A court of equity can give relief on a bill by a private person for the abatement of a nuisance, only on proof of the nuisance as clear and satisfactory as would be necessary before a jury on trial on indictment for the same offence. *Mississippi & Missouri Railroad Co. v. Ward*, 2 Black, 485.

12. For the abatement of a public nuisance, a bill in equity by a private person is now the ordinary remedy, instead of an information, which was formerly resorted to. *Ib.*

13. And such a bill will lie at suit of any such person alone, if he show special private injury beyond that to the public, without a joinder of others who have suffered a like injury, even though they are joint owners with him of property injured. *Ib.*

14. To a bill for the abatement of a nuisance, brought against the person who maintains it, other persons interested in the structure complained of are not necessary parties. *Ib.*

15. In an action by a church corporation for maintaining a nuisance, mere depreciation of the property is not the only element for consideration in estimating damages; the inconvenience and discomfort caused to the congregation may be considered. *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*, 108 U. S. 317.

*Abatement — Bridge over Navigable River — Federal Question — Removal from State Court.*

See REMOVAL OF CAUSES, 38.

*Abatement — Circuit Court Jurisdiction territorially limited.*

See CIRCUIT COURT — JURISDICTION, 150.

**NUISANCE** — *continued.*

*Abatement — Jurisdiction — Supreme Court.*

See SUPREME COURT — JURISDICTION, 6.

*Abatement — Statute legalizing, Pending Proceedings.*

See STATUTES — REPEAL, 14.

*Abatement — What Court has Jurisdiction to abate.*

See DISTRICT COURT — JURISDICTION, 12, 13.

*Power of Legislature over, notwithstanding Corporate Charter.*

See CORPORATION — CHARTER, 19-24.

*Structure adjudged a Nuisance declared by Congress to be lawful.*

See JUDGMENT — OPENING AND REVERSAL, 19.

*What constitutes — Whether a Certain Bridge is — Question of Fact.*

See CASES CERTIFIED, 5.

**NULLUM TEMPUS OCCURRIT REGI** — *Application to Federal Government.*

See *Steele v. United States*, 113 U. S. 135.

**NUNC PRO TUNC** — *Allowance of Appeal — When a Supersedes.*

See APPEAL — TAKING AND PERFECTING, 17, 23, 28, 29.

*Amendment of Record to show Issue of Process — Marshal's Return.*

See WRIT AND PROCESS, 21, 22.

*Amendment in Suit for Infringement — Insertion in Answer of Names of Persons having Prior Knowledge, etc.*

See PATENT — INFRINGEMENT, 140.

*Entry of Judgment — When Matter of Discretion, etc.*

See JUDGMENT — RENDITION AND ENTRY.

*Taxation of Costs and filling Blank in Judgment.*

See COSTS, 39.

*When Supreme Court will so affirm.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 473.

## O.

**OATH** — *Omission on Petition for Removal of Cause may be waived.*  
See REMOVAL OF CAUSES, 118.

**OBLIGATION** — *Contracts — Impairment, etc.*  
See CONTRACT — IMPAIRMENT OF OBLIGATION.

**OBLIGEE; OBLIGOR** — *In general.*  
See BOND; SURETYSHIP.

**OCCUPATION** — *Action for Use and.*  
See LANDLORD AND TENANT, 37, 38.  
*Adverse Possession — Occupation under.*  
See LIMITATION — ADVERSE POSSESSION.

**OFFENCES** — *In general.*  
See CRIMES.

**OFFER** — *Element of Contract.*  
See CONTRACT — WHAT CONSTITUTES, 2 *et seq.*

*Tender — In general.*  
See TENDER.

**OFFICER** — *What is an Office — When Appointment is complete — When Term begins — Right to hold over — Officer de Facto — Resignation, when complete — Removal.*  
See pl. 1-11.

*Liability — To arrest on Criminal Process — For soliciting, etc., for Political Purposes — For Neglect to perform Ministerial Duty — When not liable for Error of Judgment or for Acts done officially — Presumptions in Favor of Regularity of Official Acts.*  
See pl. 12-25.

*Compensation — For making Expenditures required by Law — For Services rendered before taking Oath — When extra Compensation may be claimed — Effect of Act appropriating less than the Compensation first attached to Office — Construction of Acts relating to Certain Government Employees.*  
See pl. 26-36.

1. — *What is an Office — When Appointment is complete — When Term begins — Right to hold over — Officer de Facto — Resignation, when complete — Removal.* ] A public station or employment having tenure, duration, emolument, and duties, and conferred by appointment of government, is an office. *United States v. Hartwell*, 6 Wal. 385.

**OFFICER** — *continued.*

2. A nomination, confirmed by the senate, is a complete appointment to office, when the commission has been sealed and signed by the president. *United States v. Le Baron*, 19 How. 73.

3. The death of the president while the commission is in course of transmission to the appointee will not affect the appointment. *Id.*

4. In computing the term of office of an officer commissioned to hold it "during the term of four years from" a certain date, the day of the date is excluded. *Best v. Polk*, 18 Wal. 112.

5. Where one in office as mayor, with a right to hold over until due election of his successor, was, by the judges of election, returned as re-elected, and, on counting the votes the city councils declared the election of another candidate, who was thereupon installed, it was held that upon judgment of ouster on a *quo warranto* the original incumbent was entitled to the office either as having been duly elected or as holding over. *United States v. Addison*, 6 Wal. 291.

6. Where there were two marshals in a territory, one appointed by the national government, the other under a territorial law, and under the decisions of the supreme court of the territory the right to serve certain processes belonged exclusively to the United States marshal, it was held that the fact that he served the process in a foreclosure suit did not render the proceedings invalid, although the supreme court of the United States had since decided that such processes should not be served by him, his act being that of an officer *de facto*. *Hussey v. Smith*, 99 U. S. 20; *Hussey v. Merritt*, *Id.* 25.

7. In Michigan, as at common law, the resignation of a public officer is not complete until the proper authority accepts it, or does something tantamount thereto; for instance, appoints a successor. *Edwards v. United States*, 103 U. S. 471; *Thompson v. United States*, *Id.* 480.

8. An appointment to a state office which, under the existing law, is to be held for a year at a fixed per diem compensation is not a contract protected by the constitution from a subsequent statute repealing that law, removing the officer and changing the rate of compensation. *Butler v. Pennsylvania*, 10 How. 402.

9. One who is appointed professor and librarian in a university belonging to the state, the resolution of the board of curators appointing him declaring that he shall hold office for six years "subject to law," is subject to removal within the term under a statute vacating the office and appointing a new board of curators

**OFFICER — continued.**

with power to fill it. [BRADLEY, J., dissenting.] *Head v. Missouri University*, 19 Wal. 526.

10. A state statute regulating proceedings for removal from office is not repugnant to the constitution if it provides for bringing the party into court, giving him notice and an opportunity to be heard. *Foster v. Kansas*, 112 U. S. 201.

11. The Louisiana statute of January 15, 1873, "to regulate proceedings in contestations between persons claiming a judicial office," makes ample provision for notice and hearing before a court of competent jurisdiction and for an appeal, and is not unconstitutional as permitting one to be deprived of an office without due process of law, although the original proceedings are by rule returnable in twenty-four hours, and without a jury, and the appeal must be applied for within one day, made returnable within two days, and, like the original proceedings, take precedence of all other business. *Kennard v. Louisiana*, 92 U. S. 480.

12. — *Liability — To arrest on Criminal Process — For soliciting, etc., for Political Purposes — For Neglect to perform Ministerial Duty — When not liable for Error of Judgment or for Acts done officially — Presumptions in Favor of Regularity of Official Acts.* Although persons in the public service may be exempt, on the ground of public policy, from arrest on civil process, while so engaged, it is otherwise where the process is duly issued on a charge of felony, in which case every such person is liable to the ordinary process for his arrest and detention. *United States v. Kirby*, 7 Wal. 432.

13. Section 6, act of August 15, 1876 (19 Sts. 169), prohibiting, under penalties, certain federal officers "from requesting, giving to, or receiving from" any other officer "any money or property or other thing of value for political purposes," is not unconstitutional. [BRADLEY, J., dissenting.] *Ex parte Curtis*, 106 U. S. 371.

14. Where the law absolutely requires a public officer to perform a ministerial act, and he neglects or refuses to perform it, he is liable in damages to the extent of the injury arising from such neglect or refusal; and a mistake as to his duty and honesty of intention is no defence. *Amy v. Des Moines County Supervisors*, 11 Wal. 136.

15. Where the law requires a public officer to furnish copies of the records in his office, an action will lie for his refusal to comply therewith on a legal demand. *Boyden v. Burke*, 14 How. 575.

16. A demand on such an officer, accompanied with insulting language, is not a legal demand. *Ib.*

17. But such misconduct on the part of the demandant will not justify a refusal of a subsequent legal demand. *Ib.*

18. A ministerial officer, acting in good faith, is liable for compensatory damages only. *Tracy v. Swartwout*, 10 Pet. 80.

19. A public officer is not liable to an action

**OFFICER — continued.**

at suit of a private person for a mere mistake in a matter as to which he is obliged to exercise his judgment, though that person have suffered therefrom. [MCLEAN, J., dissenting.] *Kendall v. Stokes*, 3 How. 87.

20. A contract by a public officer connected with a subject fairly within the scope of his authority is deemed to have been made in his official capacity, and not to bind him personally. *Parks v. Ross*, 11 How. 362.

21. The chief of the special agents appointed by the Cherokees to superintend the removal of that nation beyond the Mississippi was a public officer within the meaning of this rule. *Ib.*

22. An order or process regular on its face, and issued by an officer or a tribunal having jurisdiction and power to issue an order or process to enforce its judgment, is a protection to a ministerial officer for acts done in its regular enforcement. *Erskine v. Hohnbach*, 14 Wal. 613; *Haffin v. Mason*, 15 Wal. 671.

23. Where a public officer is to do any act on proof of certain facts, of the competency and sufficiency of which he is to judge, it is to be presumed from the doing of the act that the proof was regularly and satisfactorily made, and its sufficiency is not subject to re-examination. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Pet. 448.

24. The presumption that a public officer has done his duty was invoked in support of a title to land under a conveyance from such officer, to show notice the giving of which was required by the statute which gave him authority to convey. *Cofield v. McClelland*, 16 Wal. 331.

25. It is a question of law for the court whether an act is a part of the official duty of a public officer. *United States v. Buchanan*, 8 How. 83.

26. — *Compensation — For making Expenditures required by Law — For Services rendered before taking Oath — When Extra Compensation may be claimed — Effect of Act appropriating less than the Compensation first attached to Office — Construction of Acts relating to Certain Government Employees.* Where the law requires a government official to do that which requires an expenditure of money, as, for instance, an internal revenue collector to give notices by advertisement, no provision being made for payment, the official, having made payment, is entitled to have the amount allowed him; and this, without regard to whether the accounting officers at the treasury reject or allow it. *United States v. Flanders*, 112 U. S. 88.

27. Although the law requires that a government official — an internal revenue collector, for instance — shall take an oath and give a bond before entering on the duties of his office, he may, nevertheless, claim compensation for a period during which he was permitted to discharge, and did discharge, the duties of the office before taking the oath and giving the bond. *Ib.*

**OFFICER — continued.**

28. An officer is not entitled to extra compensation for the performance of regular duties. Thus, the chief clerk of the finance division of the post-office department is not entitled to commissions for the negotiation of loans and for disbursements from the contingent fund. *United States v. Brown*, 9 How. 487.

29. Under the act of May 7, 1822 (3 Sts. 696), and acts subsequent, no compensation can be allowed to an officer whose compensation is fixed by law, except for duties unconnected with the duties of his office, which the law requires to be performed, and for which the law has fixed a certain compensation. *Converse v. United States*, 21 How. 463.

30. But for such extra duties an officer may receive extra compensation. Thus, a collector employed by the secretary of the treasury to purchase supplies to be used in the light-house service in general is entitled to the regular commission on disbursements for supplies for the light-houses not within his district. [CATRON, GRIER, and CAMPBELL, JJ., dissenting.] *Ib.*

31. So where a receiver of public money for a land district is employed in connection with the sale of Indian trust lands, he may claim compensation for such service, independently of his salary as receiver. *United States v. Brindle*, 110 U. S. 688.

32. Where the by-laws of a home for disabled soldiers prohibit its officers from contracting for, or receiving, compensation for services beyond their stated salaries, the deputy-governor cannot recover for services rendered at the request of the building committee, and under a contract with them in connection with the erection of new buildings for the home. *Yates v. National Home*, 103 U. S. 674.

33. Although an act of congress fixes the compensation of a public officer at a certain sum, a subsequent enactment appropriating a less sum "in full compensation" suspends the operation of the earlier act, and gives the right to the lesser sum only for the period covered by the appropriation. *United States v. Fisher*, 109 U. S. 143.

34. And especially is this the case where it is otherwise apparent that congress intended to make the reduction. *United States v. Mitchell*, 109 U. S. 146.

35. An act like the act of July 28, 1866, § 18 (14 Sts. 323), giving additional pay to the employees of congress, to the capitol police, "the three superintendents of the public gardens," their clerks and assistants, and the employees of the congressional library, does not include the superintendent of the public gardens of the department of agriculture, but the superintendents of the botanical garden near the capitol. *United States v. Saunders*, 22 Wal. 492.

36. The act of March 3, 1869 (15 Sts. 283), fixed the salary of watchmen on the public grounds in Washington, which are under the

**OFFICER — continued.**

charge of the chief engineer of the army, at \$720 per annum. *United States v. Ashfield*, 91 U. S. 317.

*Act done under Process or Authority — Pleading.*

See PLEADING — GENERAL RULES, 27.

*Army Officers — In general.*

See ARMY.

*Bank — In general.*

See BANK; NATIONAL BANK.

*Bond binds to Compliance with Laws made after Execution, when.*

See INTERNAL REVENUE — PERSONS AND THINGS TAXED, 32, 33.

*Bond — Liability of Surety.*

See SURETYSHIP, 2 et seq.

*Bond of Officer — In general.*

See BOND.

*Civil Surgeon under Rev. Sts. § 4777, not Officer of United States.*

See EXECUTIVE DEPARTMENTS, 7.

*Compensation — Additional — Department Clerks, etc.*

See EXECUTIVE DEPARTMENTS, 8 et seq.

*Compensation — In general.*

See RECEIVER OF PUBLIC MONEY.

*Corporation — In general.*

See CORPORATION — OFFICERS; MUNICIPAL CORPORATION.

*County — In general.*

See COUNTY.

*Courts — In general.*

See CLERK OF COURT; COURT — IN GENERAL; MARSHAL; RECEIVER; SHERIFF.

*Death or Retirement pending Petition for Mandamus to compel Performance of Official Duty — Effect.*

See MANDAMUS, 94 et seq.

*Deed on Behalf of State, when Deed of State.*

See DEED — GRANTOR, 4.

*De Facto — Acts — Validity.*

See MUNICIPAL BONDS — IN GENERAL, 29.

*Devise to — Effect on Trusts.*

See CHARITY, 7.

*Discretion not controlled by Injunction.*

See INJUNCTION, 21.

*Emoluments of Federal Office exempt from State Taxation.*

See TAX — POWER, 74.

*Judges — In general.*

See COURT — IN GENERAL.

*Government Agents — Exemption from Liability for Acts done during Rebellion.*

See REBELLION, 13 et seq.

*Government Contracts — What Officers may make.*

See UNITED STATES — LIABILITY, 27 et seq.

**OFFICER** — *continued.*

*Government not responsible for Laches or Wrongful Act of its Officer.*

See UNITED STATES — LIABILITY, 34 *et seq.*

*Government Officers may pre-empt Public Lands.*

See LANDS OF UNITED STATES — PRE-EMPTION, 2.

*Land Department — Powers, Duties, etc., of Officers — Review of Acts.*

See LANDS OF UNITED STATES — LAND OFFICE.

*Mandamus — Federal Officer not reached by Mandamus from State Court.*

See MANDAMUS, 1.

*Mandamus to compel Performance of Ministerial Duty.*

See MANDAMUS, 14, 26.

*Marshals — Matters relating to.*

See MARSHAL.

*Measure of Damages for Usurpation of Office — Salary.*

See DAMAGES, 9.

*Mexican Territorial Officers — Power to grant Lands.*

See LANDS OF UNITED STATES — GRANTS BY FORMER GOVERNMENTS, 142 *et seq.*

*Municipal Corporation — Liability for Acts of Officers.*

See MUNICIPAL CORPORATION — LIABILITY, 17-22.

*Naval Officers — In general.*

See NAVY.

*Pardon does not restore to Office when the Office has vested in another.*

See PARDON, 4.

*Passed Assistant Surgeoncy in Navy is an Office — Notification by Secretary of Navy is Appointment.*

See NAVY, 11.

*Patent Office — Issue and Reissue of Letters-patent.*

See PATENT — ISSUE; PATENT — REISSUE.

*Postmaster, Deputy, etc. — In general.*

See POST-OFFICE.

*Presumption of Performance of Duty.*

See ABANDONED AND CAPTURED PROPERTY, 27, 28.

*Proof of Official Character — Tax-collector.*

See TAX — ASSESSMENT, 6.

*Public Lands — Title may be confirmed by Officer appointed by Congress.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 2.

*Quo Warranto to remove — Civil Proceeding — Practice.*

See QUO WARRANTO.

**OFFICER** — *continued.*

*Receivers and Disbursers of Public Money — In general.*

See RECEIVER OF PUBLIC MONEY.

*Return on Process — In general.*

See WRIT AND PROCESS.

*Revenue — In general.*

See COLLECTOR OF CUSTOMS; COLLECTOR OF INTERNAL REVENUE.

*Secretary of the Treasury — Powers.*

See TREASURY DEPARTMENT.

*Sheriffs — Matters relating to.*

See SHERIFF.

*State Office — Title of Incumbent — Federal Question — Removal of Cause from State Court.*

See REMOVAL OF CAUSES, 41 *et seq.*

*State Officer — When subject to Suit.*

See STATES — SUITS, 7 *et seq.*

*Who is an Officer.*

See RECEIVER OF PUBLIC MONEY, 26.

**OHIO** — *Mortmain — English Statutes not in force.*

See CHARITY, 10.

**OMNIA RITE ESSE ACTA** — *Application — In general.*

See PRESUMPTION.

**OPEN AND CLOSE** — *Argument, Right to open and close.*

See ARGUMENT.

**OPINION** — *Not a Part of the Record on Appeal or Error.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 32.

**ORDINANCE OF 1787** — *Power of Territorial Legislature under — When the Ordinance became inoperative.] Under the ordinance of 1787, made applicable to Indiana by act of congress, the territorial legislature had power to pass an act of incorporation. Vincennes University v. Indiana, 14 How. 296.*

2. *Seemle that the ordinance of 1787 ceased to be of force on the adoption of the constitution. Strader v. Graham, 10 How. 82.*

*Fugitive Slave Law not in Conflict.*

See SLAVERY, 31.

*Power of Congress in imposing Restrictions on New States.*

See CONGRESS, 17.

*Rights of Inhabitants of Louisiana under.*

See LOUISIANA, 3.

**OREGON** — *Grants of Public Lands to Settlers in the State.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 81 *et seq.*

**OUSTER** — *Not necessary to Breach of Covenant of Seisin.*

See COVENANT — IN GENERAL, 8.

*Presumption — Not presumed in Favor of Possession by Intruder — Intent of one who enters.*

See LIMITATION — ADVERSE POSSESSION, 27 *et seq.*

*What constitutes, between Tenants in Common.*

See TENANTS IN COMMON, 4.

**OWNER** — *Abandoned and Captured Property Acts — Who is Owner within Meaning of.*

See ABANDONED AND CAPTURED PROPERTY, 12, 13.

*Land sold for Taxes — Who entitled to redeem as "Owner."*

See TAX — COLLECTION, 43, 46.

**OYER** — *Deed — Demand of Oyer — Effect — Record.*

See PLEADING — PRACTICE IN PLEADING, 14 *et seq.*

## P.

**PACIFIC RAILROADS** — *In general.*

See RAILROAD — PARTICULAR ROADS.

*Land Grants in Aid thereof.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 28 *et seq.*

**PAINS AND PENALTIES, BILL OF** — *What constitutes.*

See ATTAINDER, 1.

**PARCELS, BILL OF** — *Not the Contract of Sale — Open to Explanation.*

See SALE — WHAT CONSTITUTES, 2.

**PARDON** — *Nature and Effect — Conditional Pardon — Acceptance — President's Power to pardon.* [A pardon is the private though official act of the executive, must be delivered to and accepted by the criminal, and cannot be noticed by the court unless brought before it judicially by plea, motion, or otherwise. *United States v. Wilson*, 7 Pet. 150.]

2. If a convict under sentence of death accept a pardon on condition of life imprisonment, he is thereby bound as to the substituted punishment, there being no duress in such case. *Ex parte Wells*, 18 How. 307.

3. A conditional pardon, *e. g.*, a pardon of a convict under sentence of death on condition of life imprisonment, is a pardon within the meaning of that provision of the constitution which confers upon the president power to grant pardons for certain offences. [McLEAN, J., dissenting.] *Ib.*

4. A pardon reaches both the guilt of the offender and the prescribed punishment, and is limited in its operation only in not restoring offices forfeited or property or interests vested in others as a consequence of conviction and judgment. *Ex parte Garland*, 4 Wal. 333.

5. Subject to exceptions therein prescribed, a pardon by the president restores all property rights lost by the offence, unless by judicial process the property has become vested in

**PARDON** — *continued.*

other persons. *Osborn v. United States*, 91 U. S. 474.

6. And a condition of a pardon, that by virtue thereof the recipient shall not claim property, or the proceeds of property, sold on a judgment under the confiscation laws, does not preclude him from applying to the court for the proceeds of a confiscated money-bond secured by mortgage, which were collected by the officers of the court in part by voluntary payment and in part by sale of the mortgaged lands, such condition being intended only to protect purchasers at judicial sale, under such laws, from any claim by the original owner for the property or the purchase-money. *Ib.*

7. The president's power to pardon extends to all cases except cases of impeachment, may be exercised before as well as after conviction, and is independent of legislative control. *Ex parte Garland*, 4 Wal. 333.

8. Thus, the pardon of an attorney of the federal courts for participation in the rebellion relieves him of all penalties and disabilities, so that he cannot be further punished, by being prevented from appearing in those courts, by an act requiring attorneys to subscribe an oath denying such participation. [CHASE, C. J., and SWAYNE, MILLER, and DAVIS, JJ., dissenting.] *Ib.*

**Amnesty** — *In general.*

See AMNESTY.

**Effect on Rights of Owner of Abandoned and Captured Property.**

See ABANDONED AND CAPTURED PROPERTY, 3, 4, 6, 7.

**Evidence in Support of Claim to Abandoned and Captured Property.**

See ABANDONED AND CAPTURED PROPERTY, 5.

**President's Power to pardon** — *Not interfered with by Remission of Penalties, etc., by Secretary of Treasury.*

See SHIPPING — REGULATION, 29.

**PARENS PATRIÆ** — *Government Right to sue Union Pacific Railroad.*  
See RAILROAD — PARTICULAR ROADS.

**PARENT AND CHILD** — *In general.*  
See GUARDIAN; INFANCY.  
*Transactions between — Carefully scrutinized.*  
See EQUITY — JURISDICTION, 84, 85.

**PARISH COURT** — *Jurisdiction of Suit for Separation of Property between Husband and Wife.*  
A Louisiana parish court has jurisdiction of a suit for separation of property between husband and wife. The limitation of the jurisdiction depends on the amount involved, without regard to whether the suit is prosecuted for the recovery of money or money's worth. *Carite v. Trotot*, 105 U. S. 751.

**PAROL AGREEMENT** — *Contract under Seal may be varied by.*  
See CONTRACT — RESCISSION, WAIVER, ETC., 10.  
*Performance — In general.*  
See SPECIFIC PERFORMANCE.  
*Statute of Frauds as affecting.*  
See FRAUDS, STATUTE OF.

**PAROL EVIDENCE** — *Vary or explain Written Instruments.*  
See EVIDENCE — EXTRINSIC OR PAROL.

**PARTICULARS, BILL OF** — *What sufficient.*  
See PLEADING — PRACTICE IN PLEADING, 1, 2.

**PARTIES** — *Abandoned and Captured Property — Who may sue for Proceeds.*  
See ABANDONED AND CAPTURED PROPERTY.

*Absence as suspending the running of the Statute of Limitations.*  
See LIMITATION — EXCEPTIONS AND INTERRUPTIONS, 5-9.

*Actions — Parties thereto, in general.*  
See ACTION; CONTRACT — WHAT CONSTITUTES, 20 *et seq.*

*Admiralty — Who proper — Joinder.*  
See ADMIRALTY — PRACTICE, 34 *et seq.*

*Admissions and Declarations as Evidence.*  
See EVIDENCE — HEARSAY.

*Appeal — Parties thereto.*  
See APPEAL — TAKING AND PERFECTING, 1 *et seq.*

*Appeal — Dismissal for Defect of Parties.*  
See APPEAL AND ERROR — PROCEEDINGS ABOVE, 119 *et seq.*

*Appeal-bond running to the State or to A. in the alternative — Who may sue thereon.*  
See APPEAL-BOND, 2.

*Bills and Notes — Actions on.*  
See BILLS AND NOTES — ACTIONS, 8-11.

**PARTIES** — *continued.*

*Bonds — Actions on.*  
See BOND — ACTION, 2-10.

*Carriers — Actions against.*  
See CARRIER — ACTIONS AGAINST, 1-4.

*Cashier of Bank — When may sue in his own Name.*  
See BANK, 55.

*Cause remanded to allow the making of Proper Parties — When.*  
See APPEAL AND ERROR — PROCEEDINGS ABOVE, 512 *et seq.*

*Chose in Action — Action thereon.*  
See ASSIGNMENT, 29, 30.

*Circuit Court — Jurisdiction as depending on Character of Parties.*  
See CIRCUIT COURT — JURISDICTION.

*Citizenship as affecting Jurisdiction of Circuit Court under Bankrupt Act.*  
See BANKRUPTCY — JURISDICTION, 6.

*Confiscation Proceedings — Private Person can join with Government only as Informer.*  
See CONFISCATION, 46.

*Consignee, who has made Advances — Right to sue in his own Name.*  
See AGENCY, 26.

*Contract — Construction by Parties — How far favored.*  
See CONTRACT — CONSTRUCTION, 2, 3, 5.

*Contract — Parties — Joint and Several — Privity.*  
See CONTRACT — WHAT CONSTITUTES, 18 *et seq.*

*Corporation — Suits by and against.*  
See CORPORATION — SUITS.

*Costs — Liability to Clerk for Fees.*  
See CLERK OF COURT, 1.

*Court of Claims — Jurisdiction — Parties as affecting.*  
See COURT OF CLAIMS — JURISDICTION.

*Covenant to arbitrate — Who Proper Parties to Action.*  
See ARBITRATION AND REFERENCE, 10.

*Creditors — Several may join in Bill — Who joined in Bills against Estates of Deceased Partners — Intervention.*  
See CREDITORS' BILL, 8 *et seq.*

*Deed — Parties — Construction — When adopted.*  
See DEED — CONSTRUCTION, 8, 9.

*Defect of — Ground for Dismissal of Appeal or Writ of Error.*  
See APPEAL AND ERROR — PROCEEDINGS ABOVE, 119 *et seq.*

*Different Purchasers of Distinct Parcels of Land claimed by Plaintiff as Devisee or Heir may be joined as Defendants — In general.*  
See EQUITY PLEADING — BILL, 11 *et seq.*

**PARTIES — continued.**

*Ejectment, in general — In Vermont — In Tennessee.*

See EJECTMENT — PLEADING AND PRACTICE, 1 *et seq.*

*Equity — In general.*

See EQUITY — PARTIES.

*Executors and Administrators — Suits by or against.*

See EXECUTOR AND ADMINISTRATOR — SUITS.

*Federal Courts — Joinder in, as affected by Process Acts.*

See FEDERAL COURTS — PRACTICE, 32.

*Federal Courts — Jurisdiction as affecting Parties — Parties of Record.*

See FEDERAL COURTS — JURISDICTION, 35.

*Foreclosure of Mortgage — Necessary Parties, etc.*

See MORTGAGE — FORECLOSURE, 11 *et seq.*

*Fraudulent Conveyance — Bill to set aside.*

See FRAUDULENT CONVEYANCE, 48.

*Identity necessary that Prior Suit may be a Bar.*

See LIS PENDENS, 11, 12.

*Injunction Bonds — Actions on.*

See INJUNCTION, 62.

*Injunctions — Proceedings.*

See INJUNCTION, 6 *et seq.*, 50 *et seq.*

*Insurance Policy in which Insurers join — Action on.*

See INSURANCE — FIRE, 47.

*Insurance Policies — Suits on.*

See INSURANCE — LIFE, 46 *et seq.*; INSURANCE — MARINE, 143 *et seq.*

*Joinder — Acquittal of one — Used as Witness.*

See TRESPASS, 5.

*Joinder in Writ of Right.*

See WRIT OF RIGHT.

*Joinder of Real Parties — Requirement therefor — When satisfied.*

See ACTION, 1, 2.

*Joinder of Salvors in Claim for Single Service.*

See APPEAL AND ERROR — JURISDICTION, 122.

*Joint Contract — All Promisees must be joined in Action.*

See CONTRACT — WHAT CONSTITUTES, 21, 22.

*Joint Owners of Merchandise — Suit by one against Consignee for Violation of Instructions.*

See JOINT TENANTS, 1.

*Judgment — Who Parties — Who affected, etc.*

See JUDGMENT.

**PARTIES — continued.**

*Judgment — Action against several — Against one in several Capacities, etc.*

See JUDGMENT — RENDITION AND ENTRY, 16 *et seq.*

*Libel by Shippers for Compensation for Injury to Goods — Joinder.*

See APPEAL AND ERROR — JURISDICTION, 126.

*Mandamus — Necessary and Proper Parties — Joinder.*

See MANDAMUS, 78 *et seq.*

*Mortgages — Parties thereto.*

See MORTGAGE.

*Negotiable Instruments — When incompetent as Witnesses.*

See BILLS AND NOTES — IN GENERAL, 8-12.

*New Parties — When brought in by Cross-bill.*

See EQUITY PLEADING — CROSS-BILL, 2, 3.

*Non-joinder of Parties Plaintiff — Demurrer.*

See PLEADING — DEMURRER, 4.

*Partnership Accounts — Bill to settle — Suits against Firm.*

See PARTNERSHIP, 52 *et seq.*

*Principal may sue in his own Name on Agent's Contract, when.*

See AGENCY, 58, 59.

*Prize Courts — Parties to Proceedings therein.*

See PRIZE — PRACTICE, 2.

*Proceedings before Commissioners to settle Land Claims in Louisiana, California, etc.*

See LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS, 303 *et seq.*

*Public Nuisance — Bill for Relief — Who may bring — Who must be joined as Defendants.*

See NUISANCE, 12 *et seq.*

*Removal of Cause from State Court — Parties as affecting.*

See REMOVAL OF CAUSES, 64 *et seq.*

*Review — Bill of — Who joined.*

See EQUITY — REVIEW, 19.

*Salvage — Parties to Proceedings for.*

See SALVAGE, 14.

*Seamen's Libel for Wages — Joinder.*

See APPEAL AND ERROR — JURISDICTION, 119.

*Specific Performance — Necessary Parties — Joinder.*

See SPECIFIC PERFORMANCE, 47 *et seq.*

*States as Parties to Suits.*

See STATES — SUITS.

*Suits by and against the United States.*

See UNITED STATES — SUITS.

*Sureties in Administration Bond — When joined in Suit against Administrator.*

See EXECUTOR AND ADMINISTRATOR — BOND, 5.



**PARTIES** — *continued.*

*Trust Property — Suits concerning.*

See **TRUST**.

*Want or Minjoinder — Objection not first made on Appeal or Error.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 250.

*Want of Parties — Bill, when dismissed.*

See **EQUITY — DECREE**, 10-13.

*Witness — Competency of Party.*

See **EVIDENCE — PRIMARY AND SECONDARY**, 5; **WITNESS — COMPETENCY**, 16 *et seq.*

*Witnesses — Competency under Act of 1864.*

See **WITNESS — COMPETENCY**, 25 *et seq.*

*Writ of Error, in general — Joinder — Non-joinder.*

See **ERROR — BRINGING AND PERFECTING**.

**PARTITION — Jurisdiction — Parties — Presumption — Partition Deed — Decree, Effect of.** In Maryland, on a proceeding under the statute of 1786, for the partition of the estate of an intestate, the court may take jurisdiction, although none of the heirs be of age. *Thompson v. Tolmie*, 2 Pet. 157.

2. Part owners or tenants in common of real estate, of which partition is sought in equity, have an interest in the subject-matter of the suit and in the relief prayed, so intimately connected with that of their co-tenants, that if these cannot be subjected to the jurisdiction, the bill will be dismissed. *Barney v. Baltimore*, 6 Wal. 280.

3. Where a trustee has power to make partition of lands, the partition is not invalid because intrusted to arbitrators, whose award the trustee confirms by executing the necessary indenture. *Phelps v. Harris*, 101 U. S. 370.

4. A lawful partition among tenants in common by judicial decree, and receipt thereunder by the demandant of her lawful share, cannot be presumed from lapse of time, acquiescence, and the destruction of the records of the court having jurisdiction to make such partitions, where the demandant married while under age and remained covert until shortly before bringing the action. *Weatherhead v. Baskerville*, 11 How. 329.

5. A deed of lands sold on decree in proceedings for partition, under the Maryland statute of 1786, need not recite more than the substance of the commission and of the proceedings thereon. *Thompson v. Tolmie*, 2 Pet. 157.

6. Recitals in the deeds of partition executed by commissioners, under the decree, cannot have effect as an adjudication beyond the scope of the decree; nor will a mere confirmation of deeds containing recitals, going beyond the decree, be deemed to indicate an intention of the court to go beyond its terms. *McCall v. Carpenter*, 18 How. 297.

7. A decree for partition in a suit against the heirs and a vendee of a deceased tenant in common will not estop the heirs from setting up

**PARTITION** — *continued.*

fraud in the deed of their ancestor, in a subsequent ejectment against the vendee, if the proceedings in partition did not involve the validity of that conveyance. *Ib.*

8. Nor where the heirs were non-residents, and never appeared nor were served with process within the jurisdiction. *Ib.*

9. A record of a suit in partition, resulting in a decree and a sale thereunder, is admissible in evidence against a stranger to those proceedings, notwithstanding irregularities in the conduct of the case or in the sale. *Gregg v. Forsyth*, 24 How. 179.

10. In Illinois, a decree in a proceeding in chancery for a partition, in analogy to the decree in the similar proceeding in England, merely makes a division and allotment of the land. It does not transfer the title from one co-tenant to another. That is effected by the execution of conveyances between the parties, which the decree may compel. *Gay v. Parpart*, 106 U. S. 679.

11. Where the decree in such a proceeding erroneously declares the nature of the estate of each co-tenant, and immediately deeds, *inter partes*, are made which do not follow the decree, in a suit brought twelve years afterwards to perfect the partition by compelling conveyances in accordance with the decree, the court may inquire into the equities, and refuse the order, where such an order would be inequitable. *Ib.*

12. If the decree be made by consent of the party against whom the error is committed, and he receive no valuable consideration, and if no one be interested but volunteers, or those who have purchased with full notice of the facts, no order for conveyances will be made, but the parties will be left to their rights under the conveyances made at the time. *Ib.*

13. One cannot be an innocent purchaser for value who is attorney for the plaintiff, and who purchases from him pending the suit to enforce the decree. *Ib.*

14. In Illinois, where a decree in partition finds that due notice of the proceedings was given to the parties in interest, the finding is *prima facie*, but not conclusive, evidence of the fact. *Secrist v. Green*, 3 Wal. 744.

15. In partition proceedings in Indiana, the order of the court appointing the commissioners is a determination that the application is sufficient, and that due notice of it has been given. This conclusion is not open to collateral impeachment. *Hall v. Law*, 102 U. S. 461.

*Power to make — When included in Power to sell, etc. — Power, when exhausted.*

See **POWER**, 4, 5, 26.

*Presumed after Long Possession in Severalty.*

See **JOINT TENANTS**, 2.

*Suit — What in Demand — Appellate Jurisdiction.*

See **APPEAL AND ERROR — JURISDICTION**, 90.

**PARTNERSHIP** — *What constitutes — Presumptions — Articles, Construction of — Firm Name.*

See pl. 1-13.

*Powers of Partner over Partnership Property, and to bind his Fellows.*

See pl. 14-39.

*Rights and Liabilities inter sese — Suits at Law — In Equity.*

See pl. 40-52.

*Rights and Liabilities to Third Persons — Suits — Parties.*

See pl. 53-74.

*Dissolution — How effected — Powers and Liabilities of Partners afterwards.*

See pl. 75-88.

1. — *What constitutes — Presumptions — Articles, Construction of — Firm Name.*] Where a merchant made arrangements through a special agent to consign goods to commission merchants in another city, but before shipping any goods wrote them, stating the terms of the transaction, saying, among other things, that he should hold them responsible for all goods shipped, it was held that they were so responsible, although they had turned the goods over to the agent through whom the arrangement was made, and although the agent was to have half of the profits arising from the consignments as a compensation for making the arrangement, with a guaranty of a fixed sum, such an agreement not constituting him a partner. *Berthold v. Goldsmith*, 24 How. 536.

2. A joint-stock company formed for the purpose of dealing in land by purchase and sale may be a partnership. *Clagett v. Kilbourne*, 1 Black, 346.

3. A contract between two by which one is to select and purchase lands to a certain amount with money to be furnished by the other, the purchases to be made and the conveyances to be taken in the name of the latter, the lands to be sold within a certain time, and half the net profits to be paid to the former for his services and expenses, does not make them partners. *Seymour v. Freer*, 8 Wal. 202.

4. In a suit against three to recover the price of a saw-mill alleged to have been sold to them as partners, an admission in the answer of one of them that all were interested together in the business of sawing and manufacturing lumber at the time the sale is alleged to have been made, and that they intended to procure a saw-mill, admits the fact of the partnership, especially when it is further proved that the mill was in the possession of all. *Porter v. Graves*, 104 U. S. 171.

5. Where A. and B., partners, agree with C., to receive him into their business on condition that the company is to become incorporated, and that C. is to pay into the firm at stated times, for its use, certain amounts, and it is provided that no change in the name or character of the

**PARTNERSHIP** — *continued.*

firm shall be made until the corporation shall be formed, C. does not become a member of the firm by making payment as agreed before the formation of the corporation. *Drennan v. London Assurance Co.*, 113 U. S. 51.

6. An agreement which provides that A. shall obtain in his own name, but on joint account of himself, B., and C., a lease of a railroad, and manage the same at a stated salary for the mutual benefit of all, B. and C. to furnish the capital, and after its reimbursement all to share equally in profits or in losses, is an agreement of partnership, and is, in Louisiana, an ordinary, not a commercial, partnership. *Beauregard v. Case*, 91 U. S. 134.

7. Where the question was whether one of the defendants was a partner of the other, it was properly left to the jury, on all the evidence, to say whether he was or not, notwithstanding his declarations to the plaintiff that he was not. *Teller v. Patten*, 90 How. 125.

8. One not in fact a partner cannot be made liable to third persons on the ground of having been held out as a partner, except on the principle of equitable estoppel, — that he authorized himself so to be held out, and that the plaintiff gave credit to him. *Thompson v. Toledo First National Bank*, 111 U. S. 529.

9. That real property is held in the joint names of several owners, or of one for the benefit of all, is no evidence of partnership, the presumption, in the absence of proof, being that the owners hold merely as joint tenants or tenants in common. *Thompson v. Bowman*, 6 Wal. 316.

10. In a suit brought to charge one as a partner with a debt due from the firm, evidence that the defendant had procured for a member of the firm a loan to be used in making a purchase, and that such member voluntarily promised the defendant a part of the profits to be derived from the transaction, — no definite share of the profits being named, — raises no presumption of partnership. *Pleasants v. Fant*, 22 Wal. 116.

11. A stipulation in articles of copartnership that each partner shall bear his own expenses, does not apply to extra expenses of travelling, etc., while engaged in the business of the firm. *Withers v. Withers*, 8 Pet. 355.

12. If the articles provide that a partner shall receive a certain share of the profits of certain sales of goods, "deducting the actual expenses that may appertain to the goods themselves," such deduction may include taxes, clerk hire, and advertising. *Foster v. Goddard*, 1 Black, 506.

13. Although the partnership articles adopt no firm name, yet if the partnership business be done under a particular style, that will be the name of the firm. *Le Roy v. Johnson*, 2 Pet. 186.

14. — *Powers of Partner over Partnership Property, and to bind his Fellows.*] An assignment by a partner, in the name of the partnership, of effects and credits of the partnership, for

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the benefit of particular creditors, is valid. *Harrison v. Sterry*, 5 Cranch, 289.

15. A partner cannot bind the firm by a submission of partnership interests, but he may thereby bind himself. *Karthauss v. Ferrer*, 1 Pet. 222.

16. If a partner draw a bill in his own name, the firm is not liable although he apply the proceeds to payment of a partnership debt. *Le Roy v. Johnson*, 2 Pet. 186.

17. In general, any member of a trading firm may bind the firm by drawing a bill in the firm name. *Kimbro v. Bullitt*, 22 How. 256.

18. A partnership engaged in carrying on a steam saw-mill and in buying and selling lumber is a trading partnership, and within this rule, although also engaged in farming, in which business there is, in general, no occasion to draw bills. *Ib.*

19. If one accept a bill drawn by a member of a copartnership in the firm name, for the accommodation of the firm, and afterwards pay it, his right of action against the firm is not affected by the mere fact that that member put the proceeds to an unlawful use. *Ib.*

20. If the active partner of a firm engaged in a business in which it is customary to indorse notes and obtain discounts indorse a note in the firm name, and procure it to be discounted on the account of the firm, he binds the firm, notwithstanding a secret agreement in the articles that he should not indorse, and an application of the proceeds to his own use. *Winship v. United States Bank*, 5 Pet. 529.

21. A provision in articles of copartnership that one of the partners shall have no right to indorse negotiable paper cannot be invoked to invalidate a promissory note indorsed by that partner with the firm name, in the hands of a bona fide holder for value without notice. *Michigan Insurance Bank v. Eldred*, 9 Wal. 544.

22. Secret stipulations in articles of copartnership in restriction of the powers usually possessed by partners in such business do not affect persons who deal with a partner on account of the firm, in ignorance of their existence. *Winship v. United States Bank*, 5 Pet. 529.

23. It makes no difference to the application of this rule whether the partnership be ostensible or dormant. *Ib.*

24. A partner cannot apply partnership property in payment of his individual debt, and an attempted application will not divest the title of the firm in favor of his creditor, although such creditor have no notice of the ownership of the firm. *Rogers v. Batchelor*, 12 Pet. 221.

25. There is no presumption that the contents of a letter written by a partner in his own name were known to his copartner, or assented to by him, although part of the contents of the letter related to business of the firm. *Ib.*

26. Where two persons, having carried on business as a firm, assumed to be a corporation, and one of them, as agent of the supposed cor-

**PARTNERSHIP — continued.**

poration, executed a mortgage of personalty, the other assenting, it was held that the mortgage was valid. *Anthony v. Buller*, 13 Pet. 423.

27. A partner cannot, by reason of the partnership alone, confess judgment for the firm so as to bind his copartners. *Clark v. Bowen*, 22 How. 270.

28. Where a judgment so confessed has been set aside as to the partner who did not join in the confession, it should, on motion of the judgment creditor, be set aside as to the other partners also. *Ib.*

29. If a firm of commission merchants have goods for sale on commission, and one of the firm fraudulently represent to the owner that a proposed purchaser is in good credit when he is in fact insolvent, and so induce him to consent to a sale, and the sale be made and the firm receive the commission, the firm will be liable for the fraud. *Castle v. Bullard*, 23 How. 179.

30. A purchaser of the rights of a partner, whatever the language of the conveyance, acquires not an ownership of specific effects, but only a right to a share in the surplus remaining on settlement of the partnership accounts. *New York Fourth National Bank v. New Orleans & Carrollton Railroad Co.*, 11 Wal. 624.

31. A deed the *testimonium* clause of which recites that A. & B., a firm, by one of its members, "have thereto set their hands and seals," signed and sealed by such member alone, may be deemed the deed of all the partners, on proof that they authorized its execution, and afterwards acquiesced with full knowledge of what had been done. *Gibson v. Warden*, 14 Wal. 244.

32. While the right of a partner to sign the firm name to a contract of indemnity must be clearly shown, it need not, necessarily, be shown by written authority. *Moran v. Prather*, 23 Wal. 492.

33. That an assignment signed in the name of a firm by one member of it recited the assignment to be that of the member signing it, and otherwise made no mention of the firm, will not enable the other member to deny that his interest passed, it appearing that he authorized the assignment of the interest of the firm, and received for the firm the consideration of the assignment. *George v. Tate*, 102 U. S. 564.

34. A member of a partnership which holds itself out as engaged in the business of dealing in grain is not necessarily bound by contracts made in behalf of the firm by another member of it, involving purchases of grain in distant markets for future delivery, to an amount out of all proportion to the means of the firm. *Irwin v. Wilmar*, 110 U. S. 499.

35. One member of a mining partnership has the right, without consulting his associates, to sell his interest in the partnership to a stranger or to one of his associates. By so doing no relation of trust or confidence is violated. *Bissell v. Foss*, 114 U. S. 252.

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36. And where A. and B., members of such a partnership, had consulted together in relation to buying, in behalf of themselves and of C., another partner, an outstanding interest, and B. and C. finally purchased such interest, concealing from A. the fact that they were negotiating for it, it was held that A. could claim no benefit from the transaction. [BRADLEY and MATTHEWS, JJ., dissenting.] *Id.*

37. It is to be presumed that all the members of a firm have access to the partnership books, and know their contents; but that presumption may be rebutted. *Winship v. United States Bank*, 5 Pet. 529.

38. The several members of a firm are presumed to have full knowledge of entries in the partnership books, and to consent to their allowance. *Wihers v. Wihers*, 8 Pet. 355.

39. When knowledge of a partner that goods have been illegally imported is to be considered knowledge of the firm. *Stockwell v. United States*, 13 Wal. 531.

40. — *Rights and Liabilities inter sese — Suits at Law — In Equity.* A member of a mercantile firm may, in general, enter into a contract for personal service to a third person, in which his firm shall have no interest; and he may maintain an action in his own name for the services rendered, although he conducted the correspondence in the firm's name, and promised his partners an interest in the business. *Law v. Cross*, 1 Black, 533.

41. Although in matters pertaining to the business of the partnership a partner is not permitted to traffic for his private advantage, but is held accountable for all profits, in other matters he is by law under no such restraint. Thus, if a member of a firm in "a general produce business" enter into a secret arrangement with a third person, through which he acquires title to property on which the firm has a mortgage, and which the firm desires to purchase, on payment of the mortgage debt, he does not take in trust for his copartners. *Wheeler v. Sage*, 1 Wal. 518.

42. Where one partner has by agreement full and exclusive control of the affairs of the concern, but communicates no information to his copartner, who resides at a distance and relies on him for true accounts, his relation to his copartner, whatever the relation of partner to copartner in general, is fiduciary, and governed by the law of that relation. *Brooks v. Martin*, 2 Wal. 70.

43. One of two partners who schemes for the purpose of fraudulently depriving the other of the profits of the partnership, may be charged as trustee for the partner thus wronged, to the extent of the amount fairly belonging to him. *Ambler v. Whipple*, 20 Wal. 546. And see *Ambler v. Whipple*, 23 Wal. 278.

44. A promissory note given by one member of a commercial company to another member for

**PARTNERSHIP — continued.**

the use of the company, will support an action by the promisee in his own name against the maker, although the money, when recovered, would belong to the company. *Van Ness v. Forrest*, 8 Cranch, 30.

45. The assignee of a partner in a partnership formed to deal in land may maintain a bill against the other partners and the agent of the partnership for discovery and an account. *Pendleton v. Wambersie*, 4 Cranch, 73.

46. Where, on retirement of a partner, his copartners receive the partnership effects, covenanting to apply them in payment of the firm debts, and to pay him a certain sum if so much be collected, the retired partner may have an account and relief in equity if his copartners fail to perform. *Kelsey v. Hobby*, 16 Pet. 269.

47. Where a contract of copartnership in business confessedly contrary to public policy, and illegal, has been carried out to the completion of the contemplated operation, the managing partner, who holds the profits, cannot evade an account and division in equity by asserting the illegal character of the original contract. [CATRON, J., dissenting.] *Brooks v. Martin*, 2 Wal. 70.

48. Equity will assume jurisdiction of a bill to settle the partnership accounts of a firm of attorneys, a discovery being necessary. *Denver v. Roane*, 99 U. S. 355.

49. A partner who, without reason and without his consent, is deprived of his share of the profits of a partnership venture by his partner and a third person, may maintain a suit in equity to recover it from them. *Pearce v. Ham*, 113 U. S. 585.

50. Beneficiaries of a deceased partner cannot maintain a bill for an account against the administrator, who during their minority was also their guardian, and who allowed the business to be continued by the surviving partners for several years without filing any inventory or account, where he acted in good faith, where the property increased in value, and where for more than seven years since coming of age they have received their shares of the profits and annual statements of account. They must be deemed to have acquiesced. *Hoyt v. Sprague*, 103 U. S. 613.

51. In stating a partnership account, where one partner has had entire charge of the business, he should be debited with the entire capital and the proceeds of sales; and if the capital consisted of stock which has been used in the business, or disposed of and the proceeds debited, he should be credited therewith in the amount at which it was originally charged. *Gunnell v. Bird*, 10 Wal. 304.

52. To a bill by an assignee of a partner, merely for a settlement of the partnership accounts, one who has succeeded to the rights of another partner, but not to his obligations, is not a proper party. *New York Fourth National*

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*Bank v. New Orleans & Carrollton Railroad Co.*, 11 Wal. 624.

53. — *Rights and Liabilities to Third Persons — Suits — Parties.*] Where, as in Louisiana, members of an ordinary partnership are only liable to their common creditor for their proportional part of the indebtedness of the partnership, one partner cannot offset or oppose the compensation of the personal demand of his associate to the claim of their common creditor. *Beauregard v. Case*, 91 U. S. 134.

54. In Louisiana, the contract of a mercantile firm creates an obligation in *solido*; and two of the partners may be sued thereon, if the third be out of the jurisdiction. *Breedlove v. Nicolet*, 7 Pet. 413.

55. In Mississippi, suits on written promises of copartners may be brought against one or more of them; and if three be sued, and one plead and two be defaulted, the plaintiff may discontinue as to the one who defends, and take judgment by default against the others. *Amis v. Smith*, 16 Pet. 303.

56. A partnership obligation is not to all intents the several obligation of each partner as well as the joint obligation of all, but only the several obligation of each so far that, in an action against one, judgment may pass for the entire demand if the non-joinder be not pleaded. *Mason v. Eldred*, 6 Wal. 231.

57. Where, in Louisiana, the prayer of the petition, in a suit against defendants as partners, seeks a judgment in *solido*, being based upon the hypothesis that the partnership is a commercial partnership, while the pleadings and proofs show it to have been an ordinary one, a verdict and judgment may properly be rendered against each defendant for his proportionate share of the debt. *Beauregard v. Case*, 91 U. S. 134.

58. Where several are jointly interested in a series of voyages, although a stranger may not be introduced as a partner, during their pendency, the interest of one may be assigned, and, on the termination of the enterprise, the assignee may maintain a bill for an account against the master and supercargo, one of them, the other proper parties being joined. *Mathewson v. Clarke*, 6 How. 122.

59. A partner cannot recover his share of a debt due to the partnership in an action at law against the debtor, prosecuted in his name alone. *Vinal v. West Virginia Oil & Oil Land Co.*, 110 U. S. 215.

60. Where the rights of a purchaser from a member of a partnership are denied by the other members of it, his remedy is by a bill for a settlement of the partnership accounts; and to such a bill all of the partners, including his vendor, are necessary parties. *New York Fourth National Bank v. New Orleans & Carrollton Railroad Co.*, 11 Wal. 624.

61. The heirs-at-law are not necessary parties to a bill by an administrator against the partners

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of the intestate for an account of the partnership dealings, and it makes no difference that the administrator alleges himself to be sole heir. *Moore v. Huntington*, 17 Wal. 417.

62. In a state where, in trials of suits by or against partners, proof of partnership is by statute unnecessary to the maintenance of the action, an averment in a declaration that A. and B., trading as A. & Co., complain of C. and D., trading as C. & Co., sufficiently avers partnership to bring the case within the statute. *Cooper v. Coates*, 21 Wal. 105.

63. The debt of an individual partner becomes an equitable claim against the assets of the firm on agreement between its members that the firm shall pay it. *Finley v. Lynn*, 6 Cranch, 238.

64. Partners have the right as between themselves to control the assets of the firm, and so to appropriate them to the payment of a claim by one partner on the firm. *McCormick v. Gray*, 13 How. 26.

65. The interest of one of the partners in a partnership formed for dealing in land is subject to levy and sale on execution in the same manner and with like effect as partnership personal property. *Clagett v. Kilbourne*, 1 Black, 346.

66. A purchaser at such a sale takes only the interest of the partner, subject to an adjustment of the partnership dealings, and cannot maintain ejectment, but must seek his remedy in equity on a bill praying for such an adjustment. *Id.*

67. The creditor of a partnership, one member of which has died, need not first exhaust his remedy at law against the survivor, but may, at his option, proceed in equity against the estate of the deceased partner. *Nelson v. Hill*, 5 How. 127.

68. The separate estate of a partner cannot in equity be applied to the payment of partnership debts until the separate creditors have been fully paid. Thus, a bill filed by the partnership creditors to procure a division *pari passu* of separate estate appropriated by the debtor by a deed of trust to separate creditors was held not to avail to deprive the separate creditors of their priority. *Murrill v. Neill*, 8 How. 414.

69. If the executor of a deceased partner consent to the continuance of the business by the surviving partners with the assets of the firm, his lien on property thereafter acquired will be postponed to that of creditors, where a case arises for an equitable marshalling of assets, — as, for instance, where the surviving partners make a general assignment for the benefit of creditors; and in such case the beneficiaries of the deceased partner's estate cannot have priority over the claims of creditors upon the partnership assets. *Hoyt v. Sprague*, 103 U. S. 613.

70. Where a testator directs that his capital and interest in a firm shall remain therein, and be chargeable for its debts and liabilities, but that his other property shall not be so chargeable, such other property cannot be subjected to the

**PARTNERSHIP — continued.**

payment of debts of the firm contracted after the testator's death. *Jones v. Walker*, 103 U. S. 444.

71. And dividends of profits accruing after the testator's death having been fairly made among the devisees, the payment of such dividends not having impaired the capital embarked in the business, nor withdrawn what was necessary to pay debts due when the dividends were paid, the devisees cannot be compelled to refund, although the firm afterwards become bankrupt. *Ib.*

72. Real estate purchased with partnership funds for partnership uses, although the title be taken in the name of one partner, is in equity treated as personal property, so far as may be necessary to pay partnership debts and to adjust equities between the partners; and for this purpose, in case of the death of such partner, the survivor may sell, and although he cannot transfer the legal title, that having passed to heirs or devisees, the sale vests the equitable ownership, and the purchaser may, in equity, compel them to convey. *Shanks v. Klein*, 104 U. S. 18.

73. The surviving member of a firm may pay his own debts with the firm assets, if no proceedings are instituted by the representatives of the deceased partner or by the creditors of the firm, without being chargeable with a fraud in law on the firm creditors, and, in Mississippi, without being liable, under the statute, to an attachment, in the absence of an actual intent to defraud, — the statutes of that state not forbidding preferences, if *bona fide* and without intent to secure a benefit to the debtor. *Fitzpatrick v. Flannagan*, 106 U. S. 648; *McGinty v. Flannagan*, *Id.* 661.

74. A creditor of a firm cannot maintain a bill to subject, in satisfaction of his claim, property which formerly belonged to the firm, but which, by virtue of the transfer of the interest of one of the partners to his individual creditor in payment of a just debt, such transfer being assented to by the other partner, had come to the hands of a third person for a valuable consideration, the firm and both members of it being insolvent. *Case v. Beauregard*, 99 U. S. 119.

75. — *Dissolution—How effected—Powers and Liabilities of Partners afterwards.* War dissolves partnerships between citizens of the belligerent nations, and devolves upon non-resident partners the duty of withdrawing their interests from the enemy's country in order to save them from being treated as enemy's property. *The William Bagaley*, 5 Wal. 377.

76. A partnership in the ownership of land, the land being its only subject-matter, is terminated by a sale of the land. *Thompson v. Bowman*, 6 Wal. 316.

77. The bad character and drunken and dishonest habits of a partner do not justify his copartner in treating the partnership as at an end, and in taking to himself all the benefits of their joint labors and joint property. *Ambler v. Whipple*, 20 Wal. 546. And see *Ambler v. Whipple*, 23 Wal. 278.

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78. A member of a "mining partnership" may convey his interest in the mine and business without dissolving the partnership. *Kahn v. Central Smelting Co.*, 102 U. S. 641.

79. Although the liability of a deceased copartner may be extended by contract beyond his death, in the absence of such a stipulation, even in the case of a partnership for a term of years, the death of a partner will operate as a dissolution. *Scholefield v. Eichelberger*, 7 Pet. 586.

80. Although, in general, the death of a partner will dissolve the copartnership, yet a partner may by will provide for its continuance, and, in doing so, bind all or a specific part of his estate. *Burwell v. Mandeville*, 2 How. 560.

81. The most unambiguous language is necessary to manifest an intention to render the general assets liable. *Ib.*

82. In general, a dissolution of partnership operates as a revocation of the power in one partner to bind another by contract. *Bell v. Morrison*, 1 Pet. 351.

83. An acknowledgment by a partner, after the dissolution of the partnership, will not remove the bar to an action against the firm. *Ib.*

84. An admission of a partner, made after a dissolution of the partnership, is not evidence to bind the firm. *Thompson v. Bowman*, 6 Wal. 316.

85. After the dissolution of a partnership, one partner has no implied authority to cause the appearance of another to be entered in a suit brought against the firm. Thus, if one assume to enter an appearance for another who is a non-resident of the state and who is not served with process, the want of authority may be set up in defence to an action on the judgment, when the action is brought in another state, although the defence would not avail in an action brought in the state where the judgment was rendered. [WAITE, C. J., STRONG and HUNT, JJ., dissenting.] *Hall v. Lanning*, 91 U. S. 160.

86. On a bill by an administrator against partners of the intestate for an account, the defendants should be charged with such a sum only as by reasonable care and diligence they could get for the assets in closing the business, whether their value at the date of the intestate's death or not. *Moore v. Huntington*, 17 Wal. 417.

87. Where the members of a firm, believing it to be solvent, dissolve it, and the outgoing partner is repaid his capital from money borrowed by the remaining partners on their credit and responsibility as a new firm, and it afterwards turns out that the firm was insolvent at the time of the dissolution, the lender of the money to the new firm has no claim against the outgoing partner. *Penn Bank v. Furness*, 114 U. S. 376.

88. Notice of dissolution, to protect a retiring partner, may be given by any means which will fairly publish it, — by the withdrawal of the exterior indications of partnership, by an advertisement, or by other means sanctioned by local usage,

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as well as by publication in a newspaper. *Lovejoy v. Spofford*, 93 U. S. 430.

*Articles of Partnership not Evidence against Third Persons to show when Partnership was formed.*

See EVIDENCE — HEARSAY, 27.

*Assignee of a Share in Pending Adventure — When liable to Partner.*

See CONTRACT — WHAT CONSTITUTES, 1.

*Authority to bind Copartner — How proved.*

See TRIAL — INTRODUCTION OF EVIDENCE, 9.

*Bankruptcy of Firm or Member thereof.*

See BANKRUPTCY — PARTNERSHIPS, ETC., 1-4.

*Between Drawer and Holder of Bill. Effect of, on Right to Notice of Non-payment.*

See BILLS AND NOTES — INDORSEMENT, 70.

*Dissolution by War of Rebellion.*

See TRADING WITH ENEMY, 33.

*Earnings of Vessel — Jurisdiction in Admiralty.*

See ADMIRALTY — JURISDICTION, 72.

*Insurance by Member on Firm Property "as Property may appear" covers only Interest of Member.*

See INSURANCE — MARINE, 23.

*Insurance in Name of Firm.*

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*Partner — Acknowledgment of Debt by one — Statute of Limitations.*

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*Partner — Declaration of one as Evidence against another.*

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*Partner, Fraud of — Affects Co-partners sharing in Proceeds, notwithstanding their Discharge in Bankruptcy.*

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*Partner — Knowledge of one of Illegality of Importation, Knowledge of Firm.*

See DUTIES — PENALTIES AND FORFEITURES, 48.

*Partner — Neutral Domicile of Partner as affecting Right of Capture.*

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*Partner — Retirement as affecting Right to continue Business licensed under Internal Revenue Laws.*

See INTERNAL REVENUE — ASSESSMENT AND COLLECTION, 5.

*Partner — Submission to Arbitration by one — Effect.*

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*Partner sued for Partnership — Non-joinder — Plea in Abatement.*

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*Pleading — What Sufficient Allegation of Partnership after Verdict.*

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*Public Debtors — Partners — Government's Right to Priority of Payment.*

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*Settlement of Partnership Affairs — Relief in Equity.*

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**PASSENGERS** — *Rights, etc. — In general.*

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*Infringement — What constitutes — Suits therefor.*

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*License to use, etc. — In general.*

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*Patentability of Inventions — In general.*

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*Subjected in Equity to Payment of Patentee's Debts.*

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*Validity — In general — Prior use as affecting, etc.*

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**PATENT — ASSIGNMENT** — *What constitutes an Assignment — What it conveys — Legal or equitable Title — Right to reissue — Right to use the Article, etc.*] Where a recorded instrument is clearly an assignment of a patent, its effect will not be so limited as to make it a mere license, because by an unrecorded instrument of even date, referred to therein, its operation is restricted and limited. *Littlefield v. Perry*, 21 Wal. 205.

2. A deed conveying all the grantor's property of every kind carries patent-rights and extensions thereof. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Trimble*, 10 Wal. 367.

3. A deed by which a patentee conveys all his right, title, and interest in the invention, and all right, title, and interest that may be secured to him from time to time, to be held to the end of the term for which letters-patent are or may be granted, carries the entire invention, with all alterations and improvements, and all patents and extensions. [BRADLEY, J., dissenting.] *Ib.*

4. If an inventor assign all right to his invention, and the deed of assignment be duly recorded before the letters-patent are issued, the legal title will inure to the assignee on their issuance. [DANIEL, J., dissenting.] *Gayler v. Wilder*, 10 How. 477.

5. A contract for the assignment of a renewed patent to the assignee of the original, although yet to be obtained, will convey a valid equitable title. *Hartshorn v. Day*, 19 How. 211; *Day v. Union India-Rubber Co.*, 20 How. 216.

6. A grant of an extension of a patent before the extension is issued carries the legal as well as the equitable interest, if the terms of the grant be proper to that end. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Trimble*, 10 Wal. 367.

7. Where a patentee, who has an application pending for a patent covering an improvement in the invention patented, assigns all the right, title, and interest which he then has or thereafter may have to the invention, improvement, and patent, or to the patents that may be granted for the invention, or for any improvement therein, such assignment embraces a patent obtained on an application afterwards filed for an improvement in the invention covered by the original patent. *Littlefield v. Perry*, 21 Wal. 205.

8. A deed whereby a patentee constitutes the grantee therein his attorney irrevocable to hold a renewed patent for the use of the assignees of the original and their licensees, passes the entire ownership for their benefit. *Hartshorn v. Day*, 19 How. 211; *Day v. Union India-Rubber Co.*, 20 How. 216.

9. *Quære*, whether an assignee, to have a right as such to a reissue, must be an assignee of the entire interest. *Patent Commissioner v. Whiteley*, 4 Wal. 522.

10. Where an inventor assigns his invention before the issue of letters-patent, and letters are lawfully issued to the assignee in his own name, the assignee, where the instrument of assignment

**PATENT — ASSIGNMENT** — *continued.*

does not show a different intention, may obtain a renewal on the expiration of the original term. *Hendrie v. Sayles*, 98 U. S. 546.

11. The assignee of a patent-right takes subject to the legal consequences of prior acts of the patentee. *McClurg v. Kingsland*, 1 How. 202.

12. An assignee restricted to the use of the patented machine within a particular district may sell its product elsewhere. *Simpson v. Wilson*, 4 How. 709.

13. Where a patentee assigns a right to manufacture, sell, and use the patented article within a certain district, one who purchases such article within the district may use it anywhere, without regard to other assignments of territorial rights, especially where the article is such that it perishes in the first use of it. The right to the use stands on different ground from the right to make and sell. [SWAYNE, STRONG, and BRADLEY, JJ., dissenting.] *Adams v. Burke*, 17 Wal. 453.

14. One who is in lawful use of a patented machine, on the expiration of the term for which the patent was granted may continue to use it during an extended term. *Chaffee v. Boston Belting Co.*, 22 How. 217; *Union Paper-Bag Machine Co. v. Nixon* [*Paper-Bag Cases*], 105 U. S. 766.

15. Or, being the owner, may transfer his ownership and right of use to another. *Union Paper-Bag Machine Co. v. Nixon* [*Paper-Bag Cases*], 105 U. S. 766.

16. Thus, a grant by a patentee of a right to make, use, and vend to others to be used, a patented machine during the term the patent then has to run, will give a purchaser from the grantee of a machine made and sold within that term a right to use it as long as it lasts, without regard to a subsequent extension. *Bloomer v. Millinger*, 1 Wal. 340.

17. An assignee of a right to use a patented planing-machine, having a right to continue the use of a particular machine after an extension of the term, may replace worn-out knives without destroying the identity of that machine. *Wilson v. Simpson*, 9 How. 109.

18. An assignment by a patentee of all his "right, title, and interest" for a certain territory in the invention and in the letters-patent reissue of which is recited, "the same to be held and enjoyed" by the assignee and his representatives "to the full end of the term for which the said letters-patent are or may be granted," operates to convey any interest for that territory which the patentee may afterwards acquire by an extension and renewal of the patent under a prior statute. *Nicholson Pavement Co. v. Jenkins*, 14 Wal. 452.

19. Under § 18, act of July 4, 1836 (5 Sts. 125), which declares that the benefit of the renewal of a patent "shall extend to assignees and grantees of the right to use the thing patented to the extent of their interest," one who, during the original term, buys a machine which is an infringement, from one who has no right to sell



**PATENT — ASSIGNMENT — continued.**

it, and then buys the entire right of the patentee for territory where the machine is used, is protected in the use of the machine during the extended term. *Eunson v. Dodge*, 18 Wal. 414.

20. Where an English inventor disclaims one feature of the thing invented, and takes out a patent here without reference to that feature, an assignee here cannot, in a reissue, avail himself of an exclusive right to that feature, where it was clearly not original with the original patentee. *Ashcroft v. Boston & Lowell Railroad Co.*, 97 U. S. 189.

21. Under neither the act of July 3, 1832 (4 Sts. 559), nor the act of 1836, will any use of the thing patented subsequent to the issue of the original patent, and prior to its surrender on account of defective specification, confer a right to continue the use after a reissue. *Stimpson v. West Chester Railroad Co.*, 4 How. 380.

*Abrogation of Contract transferring Patent for an Annuity — Failure to pay.*

See SALE — AVOIDANCE, 6.

*Assignability of Unpatented Right under Invention.*

See ASSIGNMENT, 2.

**PATENT — CONSTRUCTION — Construction, in general — Should be liberal — Intention of Parties — Specification and Drawings to be construed with Patent — Scope of Patent limited by Claim.**

See pl. 1-15.

*Construction of Patent for Process, Combination, Machine, Result, etc.*

See pl. 16-28.

1. — *Construction, in general — Should be liberal — Intention of Parties — Specification and Drawings to be construed with Patent — Scope of Patent limited by Claim.* Patents for inventions should be liberally construed, so that, if practicable, the right of the inventor may be upheld, and not destroyed. *Turrill v. Michigan Southern & Northern Indiana Railroad Co.*, 1 Wal. 491.

2. Specifications are to be construed liberally, to promote the progress of the useful arts, and to allow inventors to retain to their own use, not what is matter of common right, but what they have created. *Winans v. Denmead*, 15 How. 330.

3. In construing a patent, the intention of the parties, i. e., the government and the patentee, is entitled to great consideration; and the special act by which the patent was authorized, the petition for its issue, and the specification may all be resorted to therefor. *Evans v. Eaton*, 3 Wheat. 454.

4. In our practice the specification is a part of the patent, and must be construed with it. *Hogg v. Emerson*, 6 How. 437; *Hogg v. Emerson*, 11 How. 587.

**PATENT — CONSTRUCTION — continued.**

5. The drawings also, as well as the entire specification, may be referred to in explanation of what is patented. *Hogg v. Emerson*, 11 How. 587; *Brooks v. Fiske*, 15 How. 212.

6. The original application for a patent, with the accompanying model and drawings, is entitled to great weight in showing what the invention was, especially where it remains unchanged for a considerable period, and is afterwards amended so as to have a broader scope. *Chicago & Northwestern Railway Co. v. Sayles*, 97 U. S. 554.

7. In patents for combinations of mechanism, limitations imposed by the inventor, especially such as were introduced into the application after it had been persistently rejected, should be looked upon as in the nature of disclaimers, and construed strictly against the inventor and in favor of the public. *Sargent v. Hall Safe & Lock Co.*, 114 U. S. 63.

8. The scope of a patent must be limited to the claim, and the claim cannot be enlarged by the language of other parts of the specification. *Lehigh Valley Railroad Co. v. Mellon*, 104 U. S. 112; *Western Electric Manufacturing Co. v. Ansonia Brass & Copper Co.*, 114 U. S. 447.

9. The claim should be construed in connection with the explanations contained in the specification. *Turrill v. Michigan Southern & Northern Indiana Railroad Co.*, 1 Wal. 491; *Mitchell v. Tilghman*, 19 Wal. 287.

10. If it does not refer to it, a reference will be implied. *Mitchell v. Tilghman*, 19 Wal. 287.

11. Thus, a claim which might otherwise be held invalid, as covering a function or result, must be construed in connection with the specification, and limited thereby, if it contain the words "substantially as described," or the like; and so construed it may be valid. *Seymour v. Osborne*, 11 Wal. 516.

12. Where a claim in a patent uses general terms of reference to the specification, such as "substantially in the manner and for the purpose herein set forth," it will be limited, by reference to the history of the art, to what was really invented by the patentee. *Carlton v. Bokee*, 17 Wal. 463.

13. While a patent, like any other written instrument, is to be interpreted by its own terms, yet where, on its face, it bears a particular construction, such construction may be confirmed by what the patentee said when he was making his application. *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222.

14. The claim admitted by the patent office and acquiesced in by the patentee should not be enlarged by construction by the courts beyond the fair interpretation of its terms. *Burns v. Meyer*, 100 U. S. 671.

15. A claim for a design "substantially as shown" refers to the description as well as to the drawing, and is without objection. *Dobson v. Hartford Carpet Co.*, 114 U. S. 439.

**PATENT — CONSTRUCTION — continued.**

16. — *Construction of Patent for Process, Combination, Machine, Result, etc.* A patent for a process consisting of several steps or stages does not secure the exclusive separate use of such constituents, the patentee not pretending to be the inventor thereof, but of the process as an entirety only. *Mowry v. Whitney*, 14 Wal. 620.

17. Where it is apparent that the object of a claim is to secure a monopoly of a process, not to enumerate the materials to which it may be applied, it is of no consequence that it specially mentions only a single material; as, for instance, straw "or fibrous material" being mentioned, the claim need not be limited to the application of the process to straw and similar vegetable substances, but may be held to embrace vegetable substances generally requiring like treatment for the purposes mentioned. *American Wood-Paper Co. v. Fibre Disintegrating Co.* [*The Wood-Paper Patent*], 23 Wal. 566.

18. Where the language of a claim is neither clear nor precise, the patentee insisting that it embraces a product as well as a process, while the word "manufacture" is used in a sense similar to "process," and if construed to mean the product would render unmeaning certain words used, and the specifications are directed almost wholly to a description of the apparatus, the mode of using it, and the process, — the patent, even on the application of the rule requiring a liberal construction, should be deemed limited to the process. *Merrill v. Yeomans*, 94 U. S. 568.

19. Where the invention described consists wholly of methods of exploding a substance, — nitro-glycerine, for instance, — so as to render it a useful explosive agent, the patent will be deemed a patent for a process, and not for a compound, a compound not being mentioned, although the claim is for the use of the substance or its equivalent, substantially in the manner and for the purposes described. *Giant Powder Co. v. California Powder Works*, 98 U. S. 126.

20. Claim for a process, as distinguished from claim for a principle. *Tilghman v. Proctor*, 102 U. S. 722.

21. A patent for a product or a composition of matter must identify it so that it can be recognized apart from the description of the process. If not, nothing can be deemed to infringe which is not made by that process. *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U. S. 293.

22. A claim for an invention for "building and setting piers by means of a floating cofferdam," the pier to be built in the dam, and the dam to be carried gradually to the bottom by the weight of the accumulated material, held to be a claim for the dam when used for the purpose designated, — a claim, i. e., for a device or instrument used in a process, and not for the process itself. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Dubois*, 12 Wal. 47.

23. A claim for a combination of several devices, so combined as to produce a certain result,

**PATENT — CONSTRUCTION — continued.**

is invalid as a claim for "any mode of combining those devices which would produce that result," and can be sustained only as a valid claim for the particular combination invented and described. *Case v. Brown*, 2 Wal. 320. See *Burr v. Duryee*, 1 Wal. 531.

24. Where a patent, if construed as claiming merely a result, would be void, but, if construed as claiming the accomplishment of the result by certain means, would be valid, the latter construction should be given where this can fairly be done. *Brown v. Guild* [*The Corn-Planter Patent*], 23 Wal. 181.

25. The claim here for an improvement in the reaping-machine, namely, a claim of "the reversed angle of the teeth of the blade, in manner described," was a distinct claim for the reversed angle of the teeth alone, and not for the combination thereof with the spear-shaped fingers arranged for the purpose of securing the grain in the operation of cutting. *Seymour v. McCormick*, 19 How. 96.

26. A combination for a shoe for car-brakes was held not to embody, as an essential part thereof, the lateral rocking motion described, such construction of the claim being reasonable and necessary to preserve to the inventor the real substance of his invention. *Lake Shore & Michigan Southern Railway Co. v. National Car-Brake Shoe Co.*, 110 U. S. 229.

27. A claim for arranging an elastic bed for printing a particular design is not a claim for a design under the act of 1861, but for a device patentable independently of that act. *Clark v. Bousfield*, 10 Wal. 133.

28. The construction of a patent or of a reissue, contended for by the patentee as essential to its validity, will be adopted if fairly consistent with the language used; as, for instance, where the reissue, if construed to be for the use of fat liquor generally, hot or cold, would be void because too broad, it will be deemed limited to the use of hot liquor only, if such construction can fairly be given it. *Klein v. Russell*, 19 Wal. 433.

**Expert Testimony in Aid thereof.**

See EVIDENCE — EXPERTS; OPINION AND REPUTATION, 5.

**PATENT — INFRINGEMENT — What constitutes Infringement — In general — Where there is Infringement, Particular Cases — Where not, Particular Cases — Infringement of Patents for Combinations.**

See pl. 1-62.

*Suits for Infringement — Parties — Who may maintain Suit, Assignor, Assignee, Licensee, etc. — Who liable.*

See pl. 63-78.

*Suits for Infringement — Defences — Prior Use or Sale — Estoppel, etc.*

See pl. 79-90.

**PATENT — INFRINGEMENT — continued.**

*Suits for Infringement — Pleading — What Bill must show — What Objection taken by Answer — What by Demurrer.*

See pl. 91-94.

*Suits for Infringement — Evidence — Burden of Proof — The Patent as Evidence — Admissibility and Effect of Evidence.*

See pl. 95-109.

*Suits for Infringement — Practice — Notice of Special Matter — What it must show — When necessary — How served — Question of Fact for the Jury — Miscellaneous Matters of Practice.*

See pl. 110-144.

*Damages — Measure of Damages under the Act of 1836 — Profits as a Measure of Damages — Interest on Profits — Price of License as a Measure of Damages — Compensatory Damages — Nominal Damages, when allowed — Time from and to which Damages are computed.*

See pl. 145-179.

**1. — What constitutes Infringement — In general — Where there is Infringement, Particular Cases — Where not, Particular Cases — Infringement of Patents for Combinations.]** One cannot appropriate the patented invention of another, even though he supplement and envelope it with important and material improvements of his own. *Cochrane v. Deener*, 94 U. S. 780.

**2.** A patent for a process which, although pointing out a particular instrument, is not confined to it, is infringed by the use of any other. *Ib.*

**3.** The only proper comparison on a question of infringement, it seems, is of the defendant's machine with that of the plaintiff, as described in the pleadings. *Blanchard v. Putnam*, 8 Wal. 420. See *Seymour v. Osborne*, 11 Wal. 516; *McCormick v. Talcott*, 20 How. 402.

**4.** Slight structural differences do not prevent an infringement where they are of degree only, and the modes of operation and the results are the same; as, for instance, in the case of two valves, in one of which all the steam which escapes into the open air escapes from the huddling chamber through a stricture which is smaller than the aperture at the ground joint, while in the other valve there are two ground joints, and only that part of the steam which passes through one of them passes into the huddling chamber and then through the stricture, the rest passing directly from the boiler into the air through the other ground joint, all, however, which passes into the huddling chamber and under the extended surface passing through the constriction at the extremity of the chamber in both valves. *Consolidated Safety-Valve Co. v. Crosby Steam-Gauge & Valve Co.*, 113 U. S. 157.

**5.** So where in the one valve the stricture is regulated as to size by an adjustable screw-ring,

**PATENT — INFRINGEMENT — continued.**

while in the other there is a screw-ring or sleeve, which closes the escape orifices from the central chamber, more or less. *Ib.*

**6.** And so where, in the infringing valve, the huddling chamber is at the centre instead of at the circumference, and is in the seat of the valve under the head instead of at the head, and the stricture, instead of being at the circumference of the head, is at the circumference of the seat of the valve. *Ib.*

**7.** A mere interchange of form may be an infringement; as, for instance, a valve, wherein the valve proper is a disc, and the extended surface an annulus surrounding it, may be infringed by a valve wherein the valve proper is an annulus and the extended surface a disc inside of it. *Ib.*

**8.** A machine having all the essential characteristics of that of which it is charged to be an infringement cannot be claimed not to infringe on the ground that the framework, which constitutes a considerable part, differs from that described in the specification of the plaintiff's application, it being apparent from the description that the claim was not intended to be confined to the form described, but that it was intended merely to show how simply and cheaply the framework could be constructed. *Brown v. Guild [The Corn-Planter Patent]*, 23 Wal. 181.

**9.** A machine, — a corn-planter, — the operation, office, purpose, and effect of which are the same as those of which it is charged to be an infringement, is not the less an infringement merely because the hinge-joint is located at a different point. *Ib.*

**10.** Where the owner of patents for improvements in metallic cotton-bale ties, each tie consisting of a buckle and a band, supplied the market with ties with the words "licensed to use once only" stamped in the metal of the buckle, one who, after the bands had been once used, bought the pieces, riveted them together, cut them of the proper length, and sold them to be used again, was held to have infringed the patents. *American Cotton-Tie Company v. Simmons*, 106 U. S. 89.

**11.** A patent for a mower and reaper with two frames, one supporting the driving-wheel and the other the cutting apparatus, so hinged as to follow the irregularities of the ground and so that the latter might be fastened at any required height, held to be infringed by a machine arranged so as to accomplish the same results, although by arrangements somewhat different. *Whiteley v. Kirby*, 11 Wal. 678.

**12.** A patented invention for a picker-staff motion in looms having no relation to the mere form of a journal-bearing arm, nor consisting in arranging a journal-bearing arm in a slot in the rocker, but which embraces every combination of a rocker with a bed and loose journal-bearing arm so arranged as to produce the required result, was held to be infringed by a combination of a rocker with a bed by loose journals project-

**PATENT — INFRINGEMENT — continued.**

ing on each side the picker-staff, the combination being effected by means of a journal-bearing arm, although the form of the arm in the infringing combination was unlike that of the patented invention, and the mode of its attachment was different, it performing the same function in substantially the same way. *Mason v. Graham*, 23 Wal. 261.

13. Where an improvement in saw-mills consists, in part, of the combination of the saw with a pair of curved guides at the upper end, the use by another of guides in the form of two straight lines describing two consecutive chords of the curve, is clearly the employment of a mechanical equivalent, and, therefore, an infringement. *Ives v. Hamilton*, 92 U. S. 426.

14. An invention of a stone-crushing machine consisting of two nearly upright convergent adjustable jaws, to one of which a limited and unvarying vibratory movement is imparted by a revolving shaft, a fly-wheel also being used to equalize the strain, is infringed by a stone-crushing machine differing from it only in that the movement of the infringing machine is varying, being communicated from the revolving shaft, through a confined column of water, the vibrating arm, the toggle, the toggle-joint and the pin-tails of the machine infringing being dispensed with, but the hydraulic arrangement substituted being their obvious and exact equivalent, and the machine infringing being the simpler and cheaper. *Blake v. Robertson*, 94 U. S. 728.

15. An invention of a process in manufacturing flour which is not limited to any special arrangement of machinery, but which consists of passing the meal through a series of bolting-reels clothed with cloth of progressively finer meshes which permit the passage of the superfine flour but retard the passage of the finer and lighter impurities, the meal, at the same time, being subjected to blasts of air introduced by hollow perforated shafts and forced through the bolting-cloth in the same direction with the meal, etc., is infringed by a process substantially the same except that a flat sieve or screen is used in place of reels, and that the air-currents are forced upward through the screen and film of meal instead of through the bolting-cloth in the same direction with the meal. [CLIFFORD and STRONG, JJ., dissenting.] *Cochrane v. Deener*, 94 U. S. 780.

16. The substantial equivalent of a thing is, in the sense of the patent law, the same as the thing itself. Two devices which perform the same function in substantially the same way, and accomplish substantially the same result, are therefore the same, although they differ in name or form. *Union Paper-Bag Machine Co. v. Murphy*, 97 U. S. 120.

17. A combination consisting of a fixed knife with a striker, and the means employed to raise the striker, the striker falling by its own weight and thereby cutting paper as it is unwound from

**PATENT — INFRINGEMENT — continued.**

a roller in pieces in form suitable for making paper-bags, infringes a patent for a combination for doing precisely the same thing, the knife itself being raised and allowed to drop. *Ib.*

18. Where a patent was for making the bodies of coal cars in the form of an inverted frustum of a cone, and with a movable bottom, and by the use of that form certain mechanical principles were made operative and a new and useful result produced, it was held that, although the patentee had described no form save that particular one, the patent covered such variations of form as substantially embodied the same mode of operation and thereby attained the same kind of result; e. g., an inverted frustum of a pyramid with an octagonal base. [See *TANEY, C. J.*, *CATRON, DANIEL*, and *CAMPBELL, JJ.*, dissenting.] *Winans v. Denmead*, 15 How. 330.

19. A dust-room in a combination of bins, elevators, etc., for cooling and drying newly ground meal, into which the lighter meal is blown, the room being divided by vertical partitions attached alternately to the floor and the ceiling and extending part way of the height, and against which the fine particles of meal are deposited by the current of air as it passes in a serpentine course over and under the partitions, to an opening for its exit at the further end of the room, is an equivalent for a dust-room of several chambers with a ventilator at the top of the uppermost one. *Gage v. Herring*, 107 U. S. 640.

20. An invention which is a mere improvement on a known machine, through a mere change of form or of combination of parts, is not infringed by an improvement of the original machine by use of a different form or combination performing the same functions. *McCormick v. Talcott*, 20 How. 402.

21. The use of a device which, while having some of the features of a patented device, yet lacks its main, essential feature, does not constitute an infringement. *Washing-Machine Co. v. Providence Tool Co.*, 20 Wal. 342.

22. Form, when of the essence of an invention, is necessarily material, and where it is inseparable from the successful operation of the machine, the attainment of the same object by a machine different in form is not an infringement. *Werner v. King*, 96 U. S. 218.

23. A patent for a product described only as the product of the process therein described is not infringed by the sale of a product not produced by that process or by a process which will produce the same thing. *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U. S. 293.

24. A process for manufacturing fat-acids and glycerine from fatty substances by the action of water at a high temperature and pressure, the process requiring, as indispensable conditions thereof, that the heating-vessel be kept quite full of the mixture of fat and water, neither steam nor air being allowed to accumulate therein, held not infringed by a process consist-

**PATENT — INFRINGEMENT — continued.**

ing in the use of water heated to a much less degree in a wholly different apparatus which permitted the existence of steam as well as water, where it appeared that the precise apparatus described in the specification had not gone into practical use, but a materially different one had been used. [SWAYNE, STRONG, and BRADLEY, JJ., dissenting.] *Mitchell v. Tilghman*, 19 Wal. 287.

25. *Overruled*, the court being of opinion that the patent was for the process, irrespective of any specific mechanism for making it effective, the only conditions required being a constant and intimate commixture of the fat with the water, a high degree of heat, and a pressure sufficiently powerful to resist the conversion of the water into steam, and that, therefore, a process infringed which fulfilled these conditions, although differing in the apparatus used, in the manner of mixing the fat and water and of applying the heat, in the degree of heat and pressure employed, and in the addition to the mixture of a small quantity of lime. *Tilghman v. Proctor*, 102 U. S. 707.

26. Where a patentee describes and claims an improvement on the cotton-gin as consisting in a particular form of rib, and a particular mode of fastening the rib to the framework, that mode of fastening is an essential part of the invention, and a substantially different mode is no infringement. *Carver v. Hyde*, 16 Pet. 513.

27. A device in a self-acting faucet which, in view of the state of the art, is limited to a screw-follower, and cannot be construed to embrace a cam arrangement for moving the valve, is not infringed by a faucet wherein the screw is not used, but which employs the old cam device for lifting the valve from its seat. *Zane v. Soffe*, 110 U. S. 200.

28. An element of a combination in a cultivator consisting of a brace-bar which strengthens and supports the shank between the tooth and the beam, is not infringed by a curved portion of a shank in a seeding-machine, which does not perform the function of the brace-bar, but which, instead of stiffening the shank, increases the strain on it. *Rowell v. Lindsay*, 113 U. S. 97.

29. A stuffed pad with a crimped leather lining, in a neck-pad for horses, is not infringed by the use of a piece of crimped leather stiffened by metal and fastened to the collar by straps. *Voss v. Fisher*, 113 U. S. 213.

30. A portable and adjustable still-water dam, wherein the sections adjust themselves to varying depths of water and the dome is let down through the well-hole in the boat, and which has self-anchors, free to slide and self-adjusting, is not infringed by an apparatus wherein the dome is not suspended from the boat or from any floating structure, wherein the funnel of the dome, though capable of adjustment, is not self-adjusting, and which has no self-anchors, free to slide and self-adjusting. *Cammeys v. Newton*, 94 U. S. 225.

31. A patent for a combination to be attached

**PATENT — INFRINGEMENT — continued.**

to a sewing-machine consisting of a vibrating marking instrument moving in unison with the needle of the machine, and a notch or elastic surface or pad under the cloth, the purpose being to mark and crease the cloth, is not infringed by the use of an attachment lacking essential features of the patented invention, as, for instance, the framework projecting from the presser-foot, the horizontal bar projecting from the framework, the spring-arms, and the horizontal bar which, in the patented invention, projects from the needle-arm to operate the spring-arms, quite different contrivances being substituted by the defendant. [WAITE, C. J., and MILLER, STRONG, and BRADLEY, JJ., dissenting.] *Fuller v. Yentzer*, 94 U. S. 288.

32. Nor is such patented invention anticipated by a prior device, for the same purpose, operating by jaws, which, descending on the fabric while open, seize and compress it, thus producing a crease, the two devices having substantial differences both in construction and mode of operation. [WAITE, C. J., and MILLER, STRONG, and BRADLEY, JJ., dissenting.] *Ib.*

33. A patent for an improvement in swage-blocks used for welding and re-forming the shattered ends of railroad rails, consisting of a large anvil with a fixed raised iron block on top, with one face formed to fit the side of a rail, and a block with its opposing face formed to fit the other side of the rail, the latter block being so arranged as by the operation of a cam to move up and grasp a rail placed between the two blocks and hold it while it is being hammered, is not infringed by a machine in which the blocks and the cam are wanting, but in which there are two unconnected jaws sliding up and down in a V-shaped notch in the anvil, and kept in place by their own weight and the weight of the rail. *Illinois Central Railroad Co. v. Turrill* [*Cawood Patent*], 94 U. S. 695.

34. The manufacture of round or cylindrical bars flattened and drilled at the eye, for use in the lower chords of iron truss bridges, is not an infringement of a patent for wide and thin-drilled eye-bars applied on edge. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274.

35. An arched guide designed to be used in connection with a roller fluting-machine, to take up a certain part of the fabric to pass between the plain surfaces of the rollers, so as to give the finished piece a puffed or crumpled surface between the rows of fluting, does not infringe a patent for a detent or finger, which by the pressure of a spring holds back that part of the fabric and forms it into V-shaped waves or crinkles. *Werner v. King*, 96 U. S. 218.

36. A wrench for inserting bung bushes which, having a core attachment to be inserted in the bush, has a rod running through the core, with a latch at the lower end fitting into a recess at the bottom of the core, the latch to be turned by a knoll at the top so as to catch against a

**PATENT — INFRINGEMENT — continued.**

projection in the bush, does not infringe a patent for a wrench with an arrangement for the application of cores of different sizes and a V-shaped projection on the handle fitting into a V-shaped slot in the bush. The doctrine of mechanical equivalents has no application. *Schumacher v. Cornell*, 96 U. S. 549.

37. A side-saddle tree having attached thereto as a part thereof tough strips of wood steamed and bent to a proper shape, forming side-rails for the seat, that on the off side extending from the cantle to the crook, and that on the other from the cantle to a point on the near side-bar some distance back of the crook, does not infringe a patent claiming a tree having the side-bars and seat made separate and then united, although, like the tree patented, it admits air under the seat. *Burns v. Meyer*, 100 U. S. 671.

38. A patent for an improvement in making artificial teeth which consists of the making of a vulcanite dental plate of a vulcanizable rubber compound, so that teeth gums and plate are perfectly joined, without crevices, etc., such invention embracing the process as well as the product, is not infringed by the use of a celluloid plate, celluloid not being an equivalent for hard rubber, being incapable of the same manipulation or of vulcanization, and the process of preparing the plate from it being, of necessity, wholly different from the vulcanite process. *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222.

39. Where, in view of the state of the art, a patent for a baker's oven was construed to be limited to the peculiar structural arrangement by which the products of combustion were admitted into the baking-chamber, viz., through openings in the arch of the furnace, and through the oven-floor only at intervals and always near the side, it was held that an arrangement wherein the bottom of the baking-chamber was not separated by a partition or diaphragm from the fire-chamber or furnace, and wherein there were no flues to conduct the generated heat into the chamber, constituted no infringement. *Garneau v. Dozier*, 102 U. S. 230.

40. A patent for a machine to drive several nails vertically at once, consisting of grooved spring jaws to hold and guide the nails, combined with an equal number of rising and falling plungers with globular collars so arranged as to spread the jaws so as to allow the head of the nail to pass, is not infringed by a machine so arranged as to drive them horizontally, and dispensing with the spring jaws and the peculiar plunger, the nails being laid in grooves and held in place until driven, by their own gravity. *Wicke v. Ostrum*, 103 U. S. 461.

41. The device commonly known as "the fish-plate joint" for uniting rails was held not to infringe the plaintiff's patent, his model containing no suggestion of the fish-plate joint, but suggesting, if anything, merely the use of a bolt in slotted holes, a device in common use long before the

**PATENT — INFRINGEMENT — continued.**

plaintiff's application, and his proofs not showing him to have been, at any time, the inventor of the fish-plate joint or of anything resembling it, and he not having claimed it until its use had become universal. *Johnson v. Flushing & North Side Railroad Co.*, 105 U. S. 539.

42. An automatic device for raising and letting down an oven-shelf which consists of a cam attached to the oven-door, passing under the edge of the shelf and raising it as the door shuts, the shelf falling of its own weight when the door opens, is not infringed by a device whereby the cam does not operate under the shelf, but on a projection attached to the upper side of it, so arranged in relation to the arm on the door as to raise and lower the shelf. As both devices act on a principle in common use, the patentee should be confined to the precise device described and claimed. *Bridge v. Excelsior Manufacturing Co.*, 105 U. S. 618.

43. A driving device in a harvester consisting of an extensible tumbling shaft is not a mechanical equivalent for a device consisting of a chain belt with open links, a rearrangement of parts being necessary to a substitution of one for the other. *Hoffheins v. Russell*, 107 U. S. 132.

44. Nor is a chain belt an equivalent for a yielding belt tightener. *Ib.*

45. A patent on a claim for an anti-friction adjustable guide in combination with "the upper portion of a web saw-blade," and a specification from which it is apparent that the patentee contemplates its use only in connection with a reciprocating saw-blade the upper end of which is free, cannot be deemed to be infringed by an endless band-saw running constantly in one direction, and having a tension over the peripheries of the wheels on which it runs, and therefore needing no guide. *Fay v. Cordesman*, 109 U. S. 408.

46. Nor can such a band-saw be deemed to infringe a patent for a guard for holding the material down on the table on which it is being sawed. *Ib.*

47. A patent for the product of any process which will produce artificial alizarine from anthracene or its derivatives, the specification intending the chemical substance known by the formula  $C^{14}H^8O^4$  as produced by the monosulphide or bromine process, is not infringed by the sale of a product known as artificial alizarine, produced by the bisulpho-acid process, and containing and deriving its efficiency from other substances like anthrapurpurine or isopurpurine. *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U. S. 293.

48. A patent for a combination safe-lock having a bolt or bearing turning or revolving on an axis, held not infringed by one having a sliding bolt. *Sargent v. Hall Safe & Lock Co.*, 114 U. S. 63.

49. A patent for an improvement in electric signalling apparatus for railroads, consisting of a combination an essential element of which is an insulated section of track used when covered

**PATENT — INFRINGEMENT — continued.**

by a locomotive or a car as a circuit closer, is not infringed by a combination in which the insulated section is dispensed with, and another and independent circuit closer by means of the earth is employed. *Electric Railroad Signal Co. v. Hall Railway Signal Co.*, 114 U. S. 87.

50. A patent for an improvement in such apparatus, consisting of a combination in which conductors are connected with positive and negative poles of the battery, the positive current being carried away from the battery by one conductor and the negative being brought back by the other, held not infringed by a combination in which both conductors carry the positive current away and the earth is used as a conductor of the return current, the one plan involving unequal circuits to be equalized by the application of independent means, the other proceeding in itself for an adjustment of equal resistances. *Ib.*

51. A patent for a combination is not infringed by a combination which entirely dispenses with one of its material parts. *Stimpson v. Baltimore & Susquehanna Railroad Co.*, 10 How. 329; *Reedy v. Scott*, 23 Wal. 352; *Dunbar v. Myers*, 94 U. S. 187; *Union Water-Meter Co. v. Desper*, 101 U. S. 332; *Gage v. Herring*, 107 U. S. 640; *Voss v. Fisher*, 113 U. S. 213; *Blake v. San Francisco*, 113 U. S. 679; *Electric Railroad Signal Co. v. Hall Railway Signal Co.*, 114 U. S. 87.

52. Nor by a combination which uses in place of such part an element substantially different therefrom. *Prouty v. Ruggles*, 16 Pet. 336; *Brooks v. Fiske*, 15 How. 212; *Eames v. Godfrey*, 1 Wal. 78; *McMurray v. Mallory*, 111 U. S. 97.

53. Nor by a combination that does not combine the elements in the same way so that each element performs the same function. *Electric Railroad Signal Co. v. Hall Railway Signal Co.*, 114 U. S. 87.

54. And it makes no difference that the new element serves the same purpose that the old one served. *Eames v. Godfrey*, 1 Wal. 78.

55. But otherwise where the new element is a known mechanical equivalent for the part omitted. *Imhaeuser v. Buerk*, 101 U. S. 647.

56. The rule as to equivalents applies as well where the invention is of a combination as where it is of a machine or a part of a machine. *Seymour v. Osborne*, 11 Wal. 516.

57. A machine will not infringe a patent for a combination unless it contain all the material matters patented, or proper substitutes therefor, well known to be such when the patent was granted. *Ib.*

58. A device in a combination is not infringed by a device not performing a similar function. *Rowell v. Lindsay*, 113 U. S. 97.

59. A patent for a combination does not cover the separate elements thereof. *Ib.*

60. A patent for a combination is not infringed by a combination which omits one of its

**PATENT — INFRINGEMENT — continued.**

parts and uses no substitute, or which uses as a substitute a part entirely new, or a part which if old was not known as a substitute at the time of the issue of the patent, or a part performing a substantially different function. *Gould v. Rees*, 15 Wal. 187.

61. A patent for a combination in a shovel-plough, of which an adjustable wheel is the important feature, the other elements of the combination not suggesting invention, is not infringed by a combination of which the adjustable wheel is not an element. *Eddy v. Dennis*, 95 U. S. 560.

62. There is no infringement in the use of one part of an invention, the patent for which is invalid as to that part for want of novelty, in combination with other inventions not covered by the patent. *Jones v. Morehead*, 1 Wal. 155.

63. — *Suits for Infringement — Parties — Who may maintain Suit, Assignor, Assignee, Licensee, etc. — Who liable.* Under the act of February 21, 1793 (1 Sts. 318), an assignee of part of a patent-right could not maintain an action on the case for infringement. *Tyler v. Tuel*, 6 Cranch, 324.

64. An action for infringement will not lie under the act of 1793 if the specification be defective under section 3, notwithstanding the absence of such fraudulent concealment as under section 6 would avoid the patent. *Grant v. Raymond*, 6 Pet. 218.

65. An assignor who still retains an interest in the patent, though none in the particular territory in question, may join as complainant in a bill for an injunction to restrain the violation of the patent in that territory. *Woodworth v. Wilson*, 4 How. 712.

66. Under the act of 1836, § 14 (5 Sts. 123), the grantee of an exclusive right to construct, use, and vend two patented machines within a specified territory, may maintain an action in his own name for an infringement of the patent within that territory. *Wilson v. Rousseau*, 4 How. 646.

67. To maintain an action for infringement under that section, which provides that the action be brought in the name of the person "interested," it is not necessary that the plaintiff be still the owner of the patent, the word "interested" meaning interested when the infringement was committed. *Moore v. Marsh*, 7 Wal. 515.

68. It is no ground for dismissing a bill for infringement of a patent-right that the plaintiff has parted with his title pending the suit, where the damages sought and shown are for a period ending before the time of sale. *Dean v. Mason*, 20 How. 198.

69. The assignee of a sectional interest, to maintain an action at law for an infringement in his own name, must have the entire right within the specified territory. *Gayler v. Wilder*, 10 How. 477.

**PATENT — INFRINGEMENT — continued.**

70. Where the owner of a patent-right grants an interest therein to one who never pays nor otherwise performs as agreed, being unable, and the contract is by common consent allowed to remain unperformed, and the grantee ever recognizes the grantor's exclusive right, the grantor will not be thereby precluded, after the grantee's death, from bringing suit for infringement without naming the grantee. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Trimble*, 10 Wal. 367.

71. A licensee under a patent cannot, as such, sue for an infringement, but must assert his rights in the name of the original patentee. *Union Paper-Bag Co. v. Nixon* [*Paper-Bag Cases*], 105 U. S. 766.

72. An infringement suit in equity may be revived by the personal representative of the deceased patentee. Such has been the unquestioned and everyday practice of the court. *Illinois Central Railroad Co. v. Turrill*, 110 U. S. 301.

73. A contract merely to buy all the product of a patented machine during a certain period, will not render the purchaser liable to an action for infringement in the use of the machine. *Keplinger v. De Young*, 10 Wheat. 358.

74. But otherwise, if the contract be only a colorable purchase, and amount to a hiring of the machine. *Ib.*

75. One who, after having assigned a patent, himself infringes the rights which he has granted, may be charged with profits made on reissues obtained by him pending the suit in equity brought against him by the assignee, where such profits should, under the assignment, inure to the assignee's benefit. *Littlefield v. Perry*, 21 Wal. 205.

76. Where a contractor laid for a city a pavement which infringed a patent, and the city paid the contractor as much therefor as it would have had to pay the patentee had he done the work, it was held, in a suit in equity against the city and the contractor for profits, that the contractor alone was liable, although the city might have been enjoined before the completion of the work, and perhaps would have been liable in an action for damages. *Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126.

77. Where one who is sued by an assignee of a patent for an infringement, seeks to defend under a license from the patentee to a third person, he must connect himself in some way with that license. *Chaffee v. Boston Belting Co.*, 22 How. 217.

78. A foreign vessel in one of our ports is not liable for an infringement of the rights of an American patentee for the use of a thing with which she was rigged in a port of the country to which she belongs, and under the authority of the laws of that country. *Brown v. Duchesne*, 19 How. 183.

79. — *Suits for Infringement — Defences — Prior Use or Sale — Estoppel, etc.* Proof that the invention had been in public use or on

**PATENT — INFRINGEMENT — continued.**

sale more than two years prior to the application for the patent, is a defence to a suit for infringement. *Bates v. Coe*, 98 U. S. 31.

80. Mere delay in applying for the patent is not. *Ib.*

81. Nothing appearing to show that A., who applied for a patent in 1854 for an invention made in 1848, had any knowledge of an English patent granted in 1850, such English patent cannot be set up by way of defence to a suit by A. for an infringement. *Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126.

82. *Quere*, whether under the act of July 4, 1836 (5 Sts. 123), or of July 8, 1870 (10 Sts. 193), a defence to an infringement suit on the ground of insufficient description can be set up without the allegation of an intent to deceive the public. *Webster Loom Co. v. Higgins*, 105 U. S. 580.

83. If the assignee of an interest in a patent-right make and sell the patented article on joint account, under an agreement with the patentee, he is estopped to deny the validity of the patent, when called on by the patentee to account. *Kinsman v. Parkhurst*, 18 How. 289.

84. Nor can he set up a right to manufacture under a license from a third person. *Ib.*

85. The defence "that the patentee fraudulently and surreptitiously obtained the patent for that which he knew was invented by another," will not avail without the further allegation that the prior inventor was at the time using reasonable diligence to perfect his invention. *Agawam Woolen Co. v. Jordan*, 7 Wal. 583.

86. Nor is an allegation of sale and public use prior to the filing of the application, with the consent and allowance of the inventor, a defence, without an allegation that such sale or use was more than two years before the patent was applied for. *Ib.*

87. A patentee is not estopped in an action for infringement, by proof that prior to the application the defendant, having devised and perfected the patented article, and being about to put it to use, described it to the patentee, the prior inventor, and that he then made no claim to the invention, there being no proof that the defendant had been misled thereby to his injury. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Dubois*, 12 Wal. 47.

88. No stipulations between a patentee and his assignee, as to royalty to be charged, can prevent the latter from recovering from an infringer all profits realized by reason of the infringement. *Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126.

89. One who pays damages decreed against him for the use of an article in infringement of a patent does not, by such payment, acquire for himself or for his vendee a right to the future use of the article; certainly not, where nominal damages only have been recovered and paid. *Birdsell v. Shaliol*, 112 U. S. 485.



**PATENT — INFRINGEMENT — continued.**

90. The special defences in an action for infringement which, under Rev. Sts. § 4920, may be made on notice under the general issue, must go to the combination. *Bates v. Coe*, 98 U. S. 31.

91. — *Suits for Infringement — Pleading — What Bill must show — What Objection taken by Answer — What by Demurrer.*] Under the act allowing reissues in divisions, where several reissues are made to cover the complete machine, all may be introduced in one bill on proceedings for infringement. *Seymour v. Osborne*, 11 Wal. 516.

92. An objection in a suit for infringement that the patented article had not fixed upon it the word "patented," as required by statute, must be taken in the answer, if intended to be raised at the hearing or before the master. *Providence Rubber Co. v. Goodyear*, 9 Wal. 788.

93. A defence to a suit for infringement, that the patentee was not the original inventor, is not available, if not set up in the answer. *Bates v. Coe*, 98 U. S. 31.

94. The objection to a bill for the infringement of a reissued patent, that the reissue was for a compound, while the original was for a process, may be taken by demurrer, the two patents being set out in the bill. The question is one of law and construction. *Giant Powder Co. v. California Powder Works*, 98 U. S. 126.

95. — *Suits for Infringement — Evidence — Burden of Proof — The Patent as Evidence — Admissibility and Effect of Evidence.*] Infringement being denied, the burden of proof is on the plaintiff. *Bates v. Coe*, 98 U. S. 31.

96. In an action for violation of a patent-right, the burden is on the defendant to show that he gave the notice required by law, to enable him to examine a witness as to the novelty of the invention. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Pet. 448.

97. Where the defendant intends to maintain at the final hearing that his machine is not an infringement, he should introduce testimony to that point, proof that the machines made and used by the defendant are substantially like the complainant's being sufficient, if not rebutted. *Bennet v. Fowler*, 8 Wal. 445.

98. The defendant in a suit for an infringement, to raise the question whether the plaintiff's original and reissued patent were for the same invention, must introduce the original patent. *Seymour v. Osborne*, 11 Wal. 516; *Bates v. Coe*, 98 U. S. 31.

99. The defence, otherwise, will not avail. *Bates v. Coe*, 98 U. S. 31.

100. The plaintiff need not introduce the original patent in evidence. *Ib.*

101. In an action for infringement, evidence that a person alleged to have made prior use of the thing patented has procured a license from the patentee is admissible on the part of the patentee on the question of such use. *Evans v. Eaton*, 3 Wheat. 454.

**PATENT — INFRINGEMENT — continued.**

102. In an action for an infringement, although evidence of a declaration by the patentee that at some prior time he had made the invention is inadmissible to prove that fact, yet evidence of a conversation in which he described his invention may be admitted to prove that he had then invented the thing described. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Pet. 448.

103. If the defendant in an action for infringement have a patent for what he uses, he may introduce it in evidence as of some weight upon the question of novelty. *Corning v. Burden*, 15 How. 252.

104. The novelty of a patented invention cannot be assailed in an action for infringement by any evidence other than that of which the defendant has given notice. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Dubois*, 12 Wal. 47.

105. On the question of the novelty, utility, and mode of use of a patented invention, a witness may be asked what its effect has been. *Klein v. Russell*, 19 Wal. 433.

106. Evidence of what is old and in general use at the time of an alleged invention is admissible at law under the general issue, and in equity without an averment thereof in the answer. *Brown v. Piper*, 91 U. S. 37.

107. Priority of invention is shown by proof that the thing in question was made complete and capable of working, that it was tested and proved successful, and was known at the time to at least five persons, and probably to many more. *Coffin v. Ogden*, 18 Wal. 120.

108. The reading of a description of an invention from a published work is evidence only of the description of the thing in question, not of its successful operation, although the operation he stated to have been successful. *Seymour v. McCormick*, 19 How. 96.

109. Thus, a statement in such a work that a machine was used successfully in 1829, coupled with testimony that it was used successfully in 1853, is not evidence from which the jury can infer that it was used successfully in the intermediate time, because there is no legal evidence that it was successful at the earlier date. *Ib.*

110. — *Suits for Infringement — Practice — Notice of Special Matter — What it must show — When necessary — How served — Question of Fact for the Jury — Miscellaneous Matters of Practice.*] The notice of special matter under the general issue, required by the act of February 21, 1793 (1 Sts. 322), need not specify the places where the thing patented is alleged to have been used before the invention by the patentee. *Evans v. Eaton*, 3 Wheat. 454.

111. That requirement of the statute does not include all matters of defence which the defendant legally may be entitled to make. *Evans v. Hettich*, 7 Wheat. 453.

**PATENT — INFRINGEMENT — continued.**

**112.** A notice of prior use need give only the name and residence of the person, and the place of the use; a notice, therefore, which gives the date of prior use does not limit the defendant to that date in his proof. *Phillips v. Page*, 24 How. 164.

**113.** The notice required by the act of July 4, 1836, § 15 (5 Sts. 123), of the names of places of residence of those by whom one sued for infringement intends to prove previous use or knowledge, and where the use has been had, need not be so specific as to relieve the plaintiff from all inquiry, but only so as to put him in the way to ascertain all that is necessary to enable him to meet the defence. *Wise v. Allis*, 9 Wal. 737.

**114.** Thus, where the suit is for the infringement of a patent for balancing millstones, a notice is sufficiently specific as to the place where the use was had, where it gives the name of the town or city, and the names and places of residence of the witnesses by whom the use is to be proved. *Ib.*

**115.** A reference to Ure's Dictionary, without specification of page, article, or subject, is not a sufficient notice of special matter under the act of 1836. *Silshy v. Foote*, 14 How. 218.

**116.** No notice is necessary to justify the admission of evidence on the part of the defendant showing the improvements in articles of the class to which the patented article belongs, in existence at the date of the plaintiff's invention. *Vance v. Campbell*, 1 Black, 427.

**117.** Where an answer to a bill to restrain an infringement alleges prior knowledge or use of the invention, to admit of proof thereof it must state the names and places of residence of the persons who had such knowledge, and the place where such use was had. *Agawam Woollen Co. v. Jordan*, 7 Wal. 583; *Seymour v. Osborne*, 11 Wal. 516.

**118.** Section 4920, Rev. Sts., which provides that proofs of previous invention, etc., may be given on notice in the answer, stating the names of patentees, the names and residences of the persons alleged to have invented or to have had prior knowledge of the thing patented, etc., does not require notice of the names of those who are to testify touching the invention, but only of those who invented or have used it. *Woodbury Patent Planing-Machine Co. v. Keith*, 101 U. S. 479.

**119.** Notice of special matter may be served and filed without an order of court, and it makes no difference that a prior insufficient notice has been served and filed. *Teese v. Huntingdon*, 23 How. 2.

**120.** It is no objection to the admission of depositions under the notice, that they were taken before the notice was served. *Ib.*

**121.** The question of novelty in an action for the infringement of a patent is for the jury. *Battin v. Taggart*, 17 How. 74.

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**122.** So is the question whether certain machines before in use are substantially the same as that the patent for which is alleged to have been infringed. *Turrill v. Michigan Southern & Northern Indiana Railroad Co.*, 1 Wal. 491.

**123.** In an action for infringement of a patent for an improvement on the cotton-gin, consisting in part of a particular mode of fastening the rib to the framework, it was held a question for the jury whether the mode adopted by the defendant was substantially different from the one described and claimed by the plaintiff. *Carver v. Hyde*, 16 Pet. 513.

**124.** In an action for infringement of a patent for a compound of known materials, the question whether a compound of given proportions is substantially the same as another of different proportions is a question for the jury. *Tyler v. Boston*, 7 Wal. 327.

**125.** In general, where, in patents for a composition of matter, any of the ingredients do not always possess exactly the same properties in the same degree, the sufficiency of the description, like the sufficiency of the description in patents for machines, is a question of fact for the jury. *Wood v. Underhill*, 5 How. 1.

**126.** Whether a patent issued after the surrender of a defective one is for a substantially different invention is a question of fact for the jury. *Stimpson v. West Chester Railroad Co.*, 4 How. 380; *Battin v. Taggart*, 17 How. 74.

**127.** So of the question whether the specifications for a patent, including the claim, are so precise as to enable any person skilled in the structure of machines to make the one described. *Battin v. Taggart*, 17 How. 74.

**128.** So of the questions whether an inventor abandoned his invention to the public, and whether the alleged infringer obtained knowledge of it surreptitiously. *Kendall v. Winsor*, 21 How. 322.

**129.** So of the question of the continuity of an application for a patent, where an application is withdrawn and a new one filed. *Godfrey v. Eames*, 1 Wal. 317.

**130.** So, on the question of the construction of two specifications of patents, whether they are of the same thing; and this, notwithstanding the general rule that the construction of written instruments is for the court. *Bischoff v. Wethered*, 9 Wal. 812.

**131.** Under the act of 1793, the defendant in a suit for infringement could defend on the ground of the insufficiency of the specifications, without proceeding under section 6 to annul the patent. *Grant v. Raymond*, 6 Pet. 218.

**132.** A pending suit for an infringement falls with its cancellation by surrender for a reissue, so that a plea that since the bringing of the suit the plaintiff has surrendered his patent is a valid defence. *Moffitt v. Garr*, 1 Black, 273.

**133.** Where a patent for infringement of which suit is brought is for a combination, and

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the declaration is for an infringement of the patent as described in that instrument, the plaintiff cannot, when it is proved that the defendant did not use part of the invention, rely on the uselessness of that part; for, having set out his patent as an entirety, he cannot charge as an infringement the use of anything less than the whole. *Vance v. Campbell*, 1 Black, 427.

134. Where the answer to a bill for infringement of a patent admitted the manufacture and sale of patented articles, and the defendant moved for leave to amend by inserting a denial, and leave was refused, the supreme court held the admission conclusive, but, in view of the circumstances, restricted it as much as it could and still give it effect as an admission of the manufacture and sale of more than one article. *Jones v. Morehead*, 1 Wal. 155.

135. The court will reverse a judgment for the defendant in an action for infringement, of its own motion, where evidence of prior use, etc., of the thing patented has been admitted, unless it appears of record that the notice of such special matter in defence was given as required by section 15 of the act of 1836; and this, although the case has proceeded throughout without reference to that objection. [GRIER, SWAYNE, and MILLER, JJ., dissenting.] *Blanchard v. Putnam*, 8 Wal. 420.

136. A patent valid on its face cannot be impeached in an action for infringement for fraud in its procurement. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Dubois*, 12 Wal. 47.

137. Where the defendant sets up a prior patent, the question of identity is a question for the jury, where there is evidence of any resemblance at all. *Tucker v. Spalding*, 13 Wal. 453.

138. Although a surrender of a patent under the act of July 8, 1870, § 53 (16 Sts. 205), pending a suit for an infringement of it, necessitates, ordinarily, the bringing of an original, not a supplemental, bill, in case of an infringement of the patent issued in lieu of that surrendered, yet, if relief is sought by supplemental bill, the irregularity may be waived by allowing the suit to proceed and proofs to be taken without objection. *Reedy v. Scott*, 23 Wal. 352.

139. And, the parties having agreed before the filing of the supplemental bill to refer the question of infringement, a plea to the supplemental bill, setting up an award and an agreement to be bound by it, has the same effect as though such matter had been set up by plea to the original bill. *Ib.*

140. Where, in a suit for infringement, the answer, after stating the names and places of residence of persons alleged to have had prior knowledge of the invention claimed to be protected by the patent, alleges such knowledge on the part of persons unknown, and craves leave to set forth their names, when discovered, an amendment allowing the insertion of the names of such

**PATENT — INFRINGEMENT — continued.**

persons is allowable *nunc pro tunc*. *Roemer v. Simon*, 95 U. S. 214.

141. An objection that the defence of prior invention cannot be set up because not stated in the manner required by statute (residences and names not being given), to be available, must be interposed before the final hearing. *Ib.*; *Webster Loom Co. v. Higgins*, 105 U. S. 580; *Zane v. Soffe*, 110 U. S. 200.

142. Where, in a suit for infringement, it appears on the face of the patent that the invention therein described is not patentable, the court of its own motion may dismiss the bill. *Slawson v. Grand Street Railroad Co.*, 107 U. S. 649.

143. The courts in this country cannot declare an element of a combination immaterial, but only whether an element omitted by the alleged infringer has been supplied by an equivalent. *Union Water-Meter Co. v. Desper*, 101 U. S. 332; *Gage v. Herring*, 107 U. S. 640; *Fay v. Cordesman*, 109 U. S. 403; *Sargent v. Hall Safe & Lock Co.*, 114 U. S. 63.

144. Where a bill for infringement of a patent for a design, alleging making and selling the invention, is taken as confessed, the patent will be held valid for the purposes of the suit, although a claim for the pattern and claims for its several parts are joined therein. *Dobson v. Hartford Carpet Co.*, 114 U. S. 439.

145. — *Damages — Measure of Damages under the Act of 1836 — Profits as a Measure of Damages — Interest on Profits — Price of License as a Measure of Damages — Compensatory Damages — Nominal Damages, when allowed — Time from and to which Damages are computed.* The act of 1836 confines the jury, in a patent cause, to the assessment of "actual damages." *Seymour v. McCormick*, 16 How. 480.

146. What the actual damages are cannot be determined by any one precise rule of law applicable to all cases. If the patentee retain the entire monopoly, the profits realized by the infringer may afford a rule; while, if he sell licenses, the price of a license may be the proper measure. *Ib.*

147. In an action at law for infringement, it is only when, from the peculiar circumstances of the case, no other rule can be made applicable, that the defendants' profits afford the criterion of damages. If sales of licenses have been sufficient to establish a price for them, such price constitutes the measure of damages. *Ib.*; *Packet Co. v. Sickles*, 19 Wal. 611; *Burdell v. Denig*, 92 U. S. 716.

148. Where the defendant has made sales of the attachment which constitutes an infringement, the profits on these sales afford a better criterion for estimating profits with which he is chargeable than is afforded by sales of machines of which the attachment forms a part, it not appearing at what profit the machines, without the attachment, could have been sold. *Mason v. Graham*, 23 Wal. 261.

**PATENT — INFRINGEMENT — continued.**

149. Where the defendant keeps a store, with clerks, etc., for the sale of certain articles, some of which infringe the plaintiff's patent, while others do not, in estimating profits due the plaintiff, a proportionate part of the expenses of the store, etc., is properly deducted from the profits from sales of the articles infringing. *Tremaine v. Hitchcock* [*The Tremolo Patent*], 23 Wal. 518.

150. The defendant in a bill for an injunction and an account of the profits of a patented machine is accountable only for profits actually made, not for what by diligence he might have made. *Livingston v. Woodworth*, 15 How. 546; *Dean v. Mason*, 20 How. 198.

151. In cases where profits are the proper measure of damages, such profits as the infringer has made, or ought to have made, govern, and not those which the plaintiff can show that he himself might have made. *Burdell v. Denig*, 92 U. S. 716.

152. The measure of damages is the profit derived from the use of the plaintiff's invention in excess of the profit derived from the use of other inventions open to the public and adequate to an equally beneficial result. *Mowry v. Whitney*, 14 Wal. 620; *Littlefield v. Perry*, 21 Wal. 205.

153. Thus, for infringement of a patent for a design, — a design, for instance, for a carpet, — the defendant cannot be held in damages for the entire profit in making and selling the article with that design, but only for so much as is shown to be due to the design alone. *Dobson v. Hartford Carpet Co.*, 114 U. S. 439.

154. An order, therefore, that the defendant account for all profits derived from the sale of the article wherein the plaintiff's patented invention was used, is too broad. *Littlefield v. Perry*, 21 Wal. 205.

155. But where the infringement was of an improvement in an article the demand for which was confined to a limited region wherein no other article for the purpose could be sold, and which demand, but for the defendant's act in making and selling, the plaintiff would have supplied, it was held that the measure of damages was the difference between the cost of manufacture to the defendant and the price received by him. *Gould's Manufacturing Co. v. Cowing*, 105 U. S. 353.

156. It is no answer to a claim for damages based on the defendant's profits that the doing of that for which the invention is used is uneconomical. The plaintiff is entitled to recover what the defendant has saved by using the invention instead of other means open to him. *Illinois Central Railroad Co. v. Turrill* [*Cawood Patent*], 94 U. S. 695.

157. Where the defendant, by devices of his own, has reduced the cost of manufacturing the infringing machine, in estimating profits with which he is chargeable, he is entitled to the bene-

**PATENT — INFRINGEMENT — continued.**

fit of the amount thus saved. *Mason v. Graham*, 23 Wal. 261.

158. An instruction that the measure of damages is the same whether the patent covers an entire machine or an improvement thereon, is erroneous. *Seymour v. McCormick*, 16 How. 480.

159. In general, interest should not be allowed before final decree on the profits found due by the master, as until then the damages are unliquidated. *Mowry v. Whitney*, 14 Wal. 620; *Littlefield v. Perry*, 21 Wal. 205.

160. While, in general, a patentee is not entitled to interest on profits made by an infringer, profits being regarded as unliquidated damages, interest may be added where a case was sent back merely to ascertain and correct the amount of damages, on principles laid down by the court, and considerable delay ensued before judgment was finally entered. *Illinois Central Railroad Co. v. Turrill*, 110 U. S. 301.

161. Interest on profits is not allowable without the special order of the court. *Parks v. Booth*, 103 U. S. 96.

162. Where profits are made by an infringer by the use of an article patented as an entirety or product, he is responsible to the patentee for them, unless he can show — and the burden is on him to show it — that a portion of them is the result of some other thing used by him. *Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126.

163. In estimating the damages for infringement, the price paid for a license may be considered, but does not afford an absolute rule. *Hogg v. Emerson*, 11 How. 587.

164. Where there is no established patent or license fee, general evidence may be resorted to for the measure of damages; and evidence of the utility and advantage of the invention over the old mode or device is competent. *Suffolk Manufacturing Co. v. Hayden*, 3 Wal. 315.

165. But in such a case the damages are not to be estimated for the whole term of the patent, but only for the period of infringement, a recovery giving the infringer no right to continue the use. *Id.*

166. In an action for infringement, proof of an established royalty does not necessarily furnish the measure of damages, where the use is brief and limited, but only where it is extensive and protracted and without excuse. *Birdsall v. Coolidge*, 93 U. S. 64.

167. The measure of damages for an infringement in the use of an attachment to a fire-engine is the price at which the invention sells, or might fairly sell; not the saving by the use of it, nor the value of the increased power given. *New York v. Ransom*, 23 How. 487.

168. In an action for infringement in which the evidence shows only a sale of a certain number of articles containing the patented device and the royalty which the plaintiff receives, it is error to instruct the jury that if they find for the plain-

**PATENT — INFRINGEMENT — continued.**

tiff they shall award a sum sufficient "to remunerate him for the wrongful act of the defendant, and to reimburse him for all such expenditures as have been necessarily incurred by him in order to establish his right," the statute entitling the plaintiff only "to the actual damages sustained;" such an instruction being too broad and too vague, and opening the way to an allowance of counsel fees and perhaps other improper charges. *Philp v. Nock*, 17 Wal. 460.

169. Measure of damages in actions for infringement. *Dean v. Mason* 20 How. 198; *Silsby v. Foote*, Id. 378; *Suffolk Manufacturing Co. v. Hayden*, 3 Wal. 315.

170. The principles on which damages in a suit against a manufacturer for infringement should be computed, stated and applied. *Providence Rubber Co. v. Goodyear*, 9 Wal. 788.

171. Compensatory damages for infringement may be allowed in equity, although the business of the infringer was so improvidently conducted as to yield no substantial profits. *Marsh v. Seymour*, 97 U. S. 348.

172. There is no legal presumption that persons who have bought of an infringer would have bought of the patentee if the infringer had not made and sold the thing patented. *Seymour v. McCormick*, 16 How. 480.

173. The plaintiff in a suit for infringement of a patent for an improvement must separate the profits due to the use of the improvement from those that arose from the unpatented parts of the article to which the improvement applies, or he can have only nominal damages. *Garretson v. Clark*, 111 U. S. 120.

174. If the plaintiff introduce no proper evidence of the damages sustained, an instruction should be given, if prayed, restraining the recovery to nominal damages. *New York v. Ransom*, 23 How. 487.

175. Only nominal damages are recoverable, where other methods in common use would have produced the same results with equal facility and cost, unless a license fee has been generally paid, when that may be taken as the criterion. *Black v. Thorne*, 111 U. S. 122.

176. Where it does not appear how much of the plaintiff's profits were due to the use of the invention covered by the patent infringed, nominal damages only are recoverable. *Blake v. Robertson*, 94 U. S. 728.

177. In taking an account, the master is not limited to the date on which the decree is entered, but may extend it to the time of the hearing, unless the infringement has ceased. *Providence Rubber Co. v. Goodyear*, 9 Wal. 788.

178. A patentee claiming under a reissued patent cannot recover damages for an infringement committed before the date of the reissue. *Agawam Woollen Co. v. Jordan*, 7 Wal. 583.

179. The fact that one who makes an article by using, without leave, a patented machine, might have bought the same article elsewhere for

**PATENT — INFRINGEMENT — continued.**

less than it cost him to make it, has no bearing on the question of the amount with which he is chargeable for the infringement. *Thomson v. Wooster*, 114 U. S. 104.

*Circuit Court may in its Discretion decide Patent Cause without Jury.*

See CIRCUIT COURT — PRACTICE, 6.

*Executor may maintain Suit when Patent is granted to him as Executor, etc.*

See EXECUTOR AND ADMINISTRATOR — SUITS, 5, 7.

*Identity between Things, in general.*

See PATENT — PATENTABILITY.

*Jurisdiction in Equity — Where an Account alone is asked.*

See EQUITY — JURISDICTION, 28.

*Jurisdiction in Error of Supreme Court in Patent Cases, without Regard to Amount involved.*

See SUPREME COURT — JURISDICTION, 47 et seq.

*Jurisdiction of Federal Courts of Controversies respecting.*

See CIRCUIT COURT — JURISDICTION, 29-31.

*Jurisdiction — Personal Service — When necessary to Jurisdiction of Circuit Court.*

See CIRCUIT COURT — PRACTICE, 30 et seq.

*Question of Fact — Whether a Machine would infringe the Patent.*

See CASES CERTIFIED, 4.

*Railroad Company, when liable for Infringement.*

See RAILROAD — COMPANY, 18.

*Record on Appeal in Suit for Infringement should set out the Account.*

See APPEAL — TAKING AND PERFECTING, 89.

*Supreme Court, District of Columbia — Powers.*

See SUPREME COURT, DISTRICT OF COLUMBIA.

**PATENT — ISSUE — Who entitled to Patent.**

See pl. 1-6.

*Abandonment — What constitutes, etc.*

See pl. 7-20.

*Application — Specification and Claim — What Specification should state — Amendment — Patentee bound by Claim — Disclaimers.*

See pl. 21-44.

*Effect of Issue — Review — Presumptions in Favor — Recitals. Description. Oath etc. — Extension, Repeal, Impeachment, etc.*

See pl. 45-68.

1. — *Who entitled to Patent.*] He who first perfects the invention and adapts it to use

**PATENT — ISSUE — continued.**

is the inventor, and entitled to the patent. *Agawam Woollen Co. v. Jordan*, 7 Wal. 583; *Seymour v. Osborne*, 11 Wal. 516.

2. Where a master-workman, employing other people in his service, has conceived the plan of an invention, and is engaged in experiments to perfect it, no suggestion from an employee, not amounting to a new method or arrangement which is in itself a complete invention, will deprive the employer of the exclusive property in the completed improvement. *Agawam Woollen Co. v. Jordan*, 7 Wal. 583.

3. Where, while in the progress of mechanical improvement, many inventors are working to a particular end, and one precedes all others, he may acquire a monopoly, if the advance is gradual, so that no one can claim the whole, each is entitled only to his own specific form of device. *Chicago & Northwestern Railway Co. v. Sayles*, 97 U. S. 554.

4. A contract with an inventor, engaging his services and ingenuity in perfecting a machine, gives no claim to an improvement made after its expiration. *Appleton v. Bacon*, 2 Black, 699.

5. And if by any mistake or irregularity the patent for such improvement, applied for by the inventor, be issued to the other party to such contract, it must be surrendered and cancelled. *Ib.*

6. The right of an inventor to a patent for an invention which he has actually made is not forfeited by the receipt of information or advice from men of science. *O'Reilly v. Morse*, 15 How. 62.

7. — *Abandonment — What constitutes, etc.* Where an inventor, after constructing a machine, puts it aside and finally breaks it up as something requiring further study and experiments, he thereby abandons his invention, if he so act with no definite intention of resuming his work on it. *Seymour v. Osborne*, 11 Wal. 516. See *Marsh v. Seymour*, 97 U. S. 348.

8. Where an application for a patent, although thrice rejected, is not abandoned by the applicant, who nine years afterwards presents a second petition, accompanied by the same drawings and by substantially the same specification, and a patent is issued, the proceeding may be deemed a continuous one, and it cannot be contended that the invention was abandoned to the public. [MILLER, FIELD, and BRADLEY, JJ., dissenting.] *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486.

9. An inventor cannot without cause hold his application pending for a long series of years, leaving the public uncertain whether he intends to prosecute it; and accordingly, where his application has been rejected and he has for many years taken no steps to reinstate or renew it or to appeal, he should be deemed to have abandoned it, especially where in all that time he has seen his invention going into common use and made no remonstrance. *Woodbury Patent Planing-Machine Co. v. Keith*, 101 U. S. 479.

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**PATENT — ISSUE — continued.**

10. Forbearance to apply for a patent during the progress of experiments, and until the inventor has perfected his invention and tested its value by use, affords no ground for presumption of abandonment. *Agawam Woollen Co. v. Jordan*, 7 Wal. 583.

11. The rule of the patent office which, prior to the patent act of 1870, provided that an abandonment should be presumed after two years from a rejection or withdrawal, being a mere rule of practice and not always enforced, was no bar to a proceeding for reinstatement, a re-examination, or an appeal, and so not an excuse for conduct which otherwise would be deemed to manifest an abandonment. *Woodbury Patent Planing-Machine Co. v. Keith*, 101 U. S. 479.

12. There may be an abandonment after as well as before an application has been made and rejected or withdrawn. *Ib.*

13. The question whether or not there has been an abandonment is not concluded by the action of the commissioner in granting a patent. *Ib.*

14. Where the patentee of improvements in a patented machine abandons them after full and fair trial as unsuccessful, the inventor of the machine, if he take them up and render them successful, may be entitled to a patent thereon. *Whitely v. Swayne*, 7 Wal. 685.

15. Where a prior invention or discovery was only an experiment, never having been perfected or brought into actual use, but abandoned and never revived by the inventor, the fact that it was described in an application for a patent, which application was voluntarily withdrawn, does not make it other than an unsuccessful experiment, and therefore is not necessarily a bar to the right of another to demand a patent, except so far as it may bear on the question of prior invention or discovery. *Brown v. Guild* [*The Corn-Planter Patent*], 23 Wal. 181.

16. One cannot claim the protection of a patent if at the time of the application the invention had been abandoned to the public. *Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92.

17. If an inventor apply for a patent for an improvement, and afterwards, with such application on file, apply for a patent for another improvement of the same thing, describing the former improvement but not claiming it as original, such description and non-claim will not amount to a dedication of the first invention to the public. *Suffolk Manufacturing Co. v. Hayden*, 3 Wal. 315.

18. Where the claim is of a specific device or combination, the non-claim of other devices or combinations apparent on the face of the specification is a dedication thereof to the public, and will be enforced as such, unless a surrender for reissue is made with due diligence, and proof made that the omission arose from inadvertence, accident, or mistake. *Miller v. Bridgeport Brass Co.*, 104 U. S. 350; *Bantz v. Frantz*, 105 U. S.

**PATENT — ISSUE — continued.**

160; *Clements v. Odorless Excavating Apparatus Co.*, 109 U. S. 641.

19. Where an inventor in his original application fails to cover his whole invention, he will be presumed, ordinarily, after twelve years, to have dedicated to the public the part not covered, and therefore to have precluded himself from the right to have it embraced in a reissue. *Turner & Seymour Manufacturing Co. v. Dover Stamping Co.*, 111 U. S. 319.

20. Where the public has acquired the right to use a device for a particular purpose, it has the right to use it for all like purposes. *Blake v. San Francisco*, 113 U. S. 679.

21. — *Application — Specification and Claim — What Specification should state — Amendment — Patentee bound by Claim — Disclaimer.* — If an applicant for a patent withdraw his application, intending to file a new one, and file a new one accordingly, the two are to be deemed as constituting one continuous application. [CLIFFORD, J., dissenting.] *Godfrey v. Eames*, 1 Wal. 317.

22. If, after a specification filed, the applicant for a patent dies, and an entire change in the specification is made by an amendment which purports to be signed by the original applicant, by his attorney, the patent thereupon issued is invalid for want of an application and oath by the administrator of the original applicant. *Eagleton Manufacturing Co. v. West, Bradley, & Carey Manufacturing Co.*, 111 U. S. 430.

23. A patentee's description of his invention is sufficient, if intelligible to those skilled in the art to which it relates. *Webster Loom Co. v. Higgins*, 105 U. S. 580.

24. The specification of an improvement must state its nature and extent, so as to distinguish it from what is already known. *Evans v. Eaton*, 7 Wheat. 356; *Evans v. Hettich*, Id. 453; *Brooks v. Fiske*, 15 How. 212.

25. A claim for a combination need not designate the particular elements thereof; it will suffice, if it declare that the combination is of so much of the machinery described as will produce a particular result. *Silsby v. Foote*, 14 How. 218.

26. And in such case, the question which of the parts described are essential to the production of such result is for the jury. *Ib.*

27. If the adaptation of a machine to a new use be matter of invention, it should be claimed, and the means by which the adaptation is made set out, in the specification or claim. *Phillips v. Page*, 24 How. 164.

28. If the specification and claim be bad because of such machinery only as has been used already, a new use of the machinery, or an application of it to an enlarged operation, will give them no validity. *Ib.*

29. Where a patent is claimed for a discovery of a new substance by means of chemical combinations of known materials, the component

**PATENT — ISSUE — continued.**

parts should be stated with clearness and precision, and not be left to be found out by one attempting to use the discovery by experiment. *Tyler v. Boston*, 7 Wal. 327.

30. Where an invention embraces only a part of an entire machine, that part should be pointed out so that one constructing such a machine might avoid the use of that part. *Seymour v. Osborne*, 11 Wal. 516.

31. In a specification of an annealing process, where the precise degree of heat required cannot be given, it will suffice if a *maximum* and a *minimum* are given, and the ascertainment of the proper degree be left to the skill and judgment of the operator who practises the process. *Moury v. Whitney*, 14 Wal. 620.

32. Section 9 of the act of 1837, providing that when a patentee accidentally claims in his specification parts that he did not invent, the patent shall still be good for the rest, applies only where those parts can be clearly distinguished. *Vance v. Campbell*, 1 Black, 427.

33. One void claim, if made by inadvertence and in good faith, will not vitiate the entire patent. *Carlton v. Boker*, 17 Wal. 463.

34. Joinder in a patent for a design of a claim for a pattern, and separate claims for each of its parts, does not *per se* invalidate the patent or any of the claims. *Dobson v. Hartford Carpet Co.*, 114 U. S. 439.

35. An amendment of the specification filed with the application for a patent, made pending the original application, cannot be sustained thereon where it materially enlarges — adds anything new to — the original claim. *Chicago & Northwestern Railway Co. v. Sayles*, 97 U. S. 554.

36. A patentee is bound by the claim set forth in his patent. He cannot claim more than he there claims. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274.

37. Although a disclaimer under the act of 1837 must state the extent of the party's interest, a statement that he is the patentee will suffice, there being an implication therefrom of ownership of the entire interest. *Silsby v. Foote*, 14 How. 218.

38. A patent may be good for what is of the patentee's own invention, although the claim be for more than he is entitled to, provided there be no unreasonable delay in entering a disclaimer for the surplus. *Silsby v. Foote*, 20 How. 378.

39. Neglect of a patentee to disclaim what the court ultimately holds to be invalid will be deemed not unreasonable, and will not render the patent altogether void, where his claim was sanctioned by the patent office and by the circuit court. *O'Reilly v. Morse*, 15 How. 62.

40. Under section 9 of the act of 1837, concerning the disclaimer of invalid claims, it is for the court and not for the jury to determine whether the disclaimer has been so unreasonably delayed as to forfeit the claim under other valid

**PATENT — ISSUE — continued.**

parts of the patent. *Seymour v. McCormick*, 19 How. 96.

41. Where a patentee points out and distinguishes what he claims as his invention, he, by implication, disclaims the rest as old. He need not expressly state what parts are new and what old, if it can be ascertained without difficulty. And the rule is the same whether the patent is for a combination or for an improvement. *Brown v. Guild [The Corn-Planter Patent]*, 23 Wal. 181.

42. Under those provisions of the act of 1837, regulating disclaimers, a disclaimer may be filed after as well as before the commencement of a suit. *Smith v. Nichols*, 21 Wal. 112.

43. But the patentee is not entitled to costs if the disclaimer be not entered before the beginning of the suit. *O'Reilly v. Morse*, 15 How. 62; *Seymour v. McCormick*, 19 How. 96; *Silsby v. Foote*, 20 How. 378.

44. This, although he recover judgment as to other claims in the patent. *Seymour v. McCormick*, 19 How. 96.

45. — *Effect of Issue — Review — Presumptions in Favor — Recitals, Description, Oath, etc. — Extension, Repeal, Impeachment, etc.* The decision of the commissioner of patents on the questions of invention, novelty, and prior use are subject to examination by the courts. The issue of the patent creates a *prima facie* right only. *Reckendorfer v. Faber*, 92 U. S. 347.

46. The decision of the commissioner of patents, adjudging an applicant for a patent entitled to it, is not subject to review by the secretary of the interior. It is the final decision of the patent office and of the department, and subject to review only by the courts in the manner prescribed by law. *Butterworth v. United States*, 112 U. S. 50.

47. Where a patent has been ante-dated, as, under the act of March 3, 1839 (5 Sts. 353), it might be where a foreign patent had been obtained, all presumptions are in favor of the correctness of the action of the commissioner of patents, it appearing that the question of date was submitted to and considered by him. *Tilghman v. Proctor*, 102 U. S. 707.

48. The recitals in a patent are not sufficient to prove that the title may take a date earlier than that of the patent, and thereby overreach another title. *Marsh v. Brooks*, 8 How. 223.

49. Recitals in the patent are, in the absence of fraud, conclusive evidence that the necessary oaths were taken before the patent was issued. *Seymour v. Osborne*, 11 Wal. 516.

50. A description in a patent for an improvement is sufficient, if a practical mechanic, acquainted with the construction of the machine in which the improvement is made, could adopt the improvement with the patent and diagram before him. *Ives v. Hamilton*, 92 U. S. 426.

51. An English patent takes effect from the time of the filing of the completed, not of the

**PATENT — ISSUE — continued.**

provisional, specification. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 436.

52. Different patentable subjects may be united in one patent, if they all relate to the same general matter, or are connected in their nature or operation. *Hogg v. Emerson*, 6 How. 437; *Hogg v. Emerson*, 11 How. 587.

53. An inventor may take out a distinct patent for a separate invention covered by one of the claims in a prior surrendered patent, where the claim as there made was void. *O'Reilly v. Morse*, 15 How. 62.

54. Whether an invention shall be embraced in one, two, or more patents is a matter not to be provided for by a general rule, but to be left to the discretion of the head of the patent office. *Bennet v. Fowler*, 8 Wal. 445.

55. A patent may refer to the specification as embodying the substantial form of the invention, where such reference does not introduce confusion and uncertainty. *Brown v. Guild [The Corn-Planter Patent]*, 23 Wal. 181.

56. The oath of an applicant for a patent that he believes himself to be the original inventor is sufficient, *prima facie*, to establish such belief. *Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126.

57. The difference between a copyright and letters-patent, stated and illustrated. *Baker v. Selden*, 101 U. S. 99.

58. The regular issue of the patent is *prima facie* evidence that the patentee was the first inventor of that which is described and claimed. *Seymour v. Osborne*, 11 Wal. 516; *Brown v. Guild [The Corn-Planter Patent]*, 23 Wal. 181; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 436.

59. So of invention, novelty, and utility. *Cammer v. Newton*, 94 U. S. 225; *Fuller v. Yentzer*, Id. 288; *Lehnbeuter v. Holthaus*, 105 U. S. 94.

60. Under the act of 1836, a patent may be extended on the application of the administrator of a deceased patentee, who, in his lifetime, disposed of the entire right granted by the letters-patent. *Wilson v. Rousseau*, 4 How. 646; *Woodworth v. Wilson*, Id. 712.

61. Such an extension inures to the benefit of the administrator only, as the representative of the deceased patentee; but persons in the lawful use of certain specified machines, at the expiration of the first term, may continue the use of those machines. [McLEAN, WAYNE, and WOODBURY, JJ., dissenting.] *Wilson v. Rousseau*, 4 How. 646; *Simpson v. Wilson*, Id. 709; *Wilson v. Turner*, Id. 712.

62. The decision of the board of commissioners provided for by that act for the hearing of such applications respecting their own jurisdiction is not conclusive. *Wilson v. Rousseau*, 4 How. 646.

63. Where a patent is extended by a special statute, it is not necessary to insert all the special



**PATENT — ISSUE — continued.**

statutory provisos in the certificate of extension. *Agawam Woollen Co. v. Jordan*, 7 Wal. 583.

64. Under the act of 1793, a repeal of a patent could not be ordered on a rule to show cause. A record had to be made, a process in the nature of a *sci. fa.* to be issued to the patentees, and questions of fact, if any, to be tried by jury. *Ex parte Wood*, 9 Wheat. 603.

65. A patent can be impeached for fraud in its procurement only by a direct proceeding to set it aside. *Seymour v. Osborne*, 11 Wal. 516; *Eureka Clothes-Wringing Machine Co. v. Bailey Washing & Wringing Machine Co.*, Id. 488.

66. Nor can an extended patent be abrogated for fraud in any collateral proceeding. The decision of the commissioner in granting the extension must be deemed conclusive until the patent is impeached in some direct proceeding. *Providence Rubber Co. v. Goodyear*, 9 Wal. 783.

67. A suit to avoid a patent must be brought by the government, or by the authority or permission of the attorney-general, and cannot otherwise be maintained by a person, except where patents have been granted to different persons for the same thing, or where a claim to a patent is rejected because the invention is covered by a prior patent, and then the patent will be avoided only so far as may be necessary to protect the right of the suitor. *Mowry v. Whitney*, 14 Wal. 434.

68. The court declined to declare a patent of long standing invalid, on testimony which was largely impeached. *Agawam Woollen Co. v. Jordan*, 7 Wal. 583.

*Mandamus to compel Preparation, etc.*

See MANDAMUS, 27.

*Mandamus to compel Issue — What open.*

See MANDAMUS, 97.

**PATENT — LICENSE — What constitutes a License — Rights conferred — When License will be presumed.** Where one sells a machine containing a patented invention, and afterwards acquires a part interest in the letters-patent, his sale operates by estoppel as a license to use the machine, so far as his interest goes. *Gottfried v. Miller*, 104 U. S. 521.

2. An agreement of compromise between a patentee and one whom he had sued for an infringement and who defended on the ground of a different process of manufacture, that the suit should be discontinued and that each party should thereafter manufacture and vend such articles of such kind and character as he saw fit, held, in the circumstances, not to operate as a license from the patentee to make such articles by his process. *Troy Iron & Nail Factory v. Corning*, 14 How. 193.

3. A grant by a patentee of a right to use a patented article to mix with an unpatented article, and sell within a certain territory for a certain

**PATENT — LICENSE — continued.**

term, the patented article to be purchased of the patentee, and the grantee to use his skill to sell the mixture, is but a license, there being no express words showing an intent to give any greater right, and terminates on the death of the grantee. *Oliver v. Rumford Chemical Works*, 109 U. S. 75.

4. In a suit brought by the assignee of an extended patent against a licensee of the patentee, the licensee has the same rights that he would have had against the patentee. *Chaffee v. Boston Belting Co.*, 22 How. 217.

5. A license to use an invention at the licensee's "own establishment" only, does not authorize use at an establishment owned by the licensee and others. *Providence Rubber Co. v. Goodyear*, 9 Wal. 788.

6. Where a patentee during the term of his original patent conveys to another the right to make and use, and to license others to use, a certain number of machines in a certain place during the remainder of such term, provided that the grantee shall not sell or grant any license to use them beyond that term, but that if the patent be extended the grantee shall have an extension of his right for a reasonable compensation, a purchase from the grantee with license to use confers no right to use beyond the original term. *Mitchell v. Hawley*, 16 Wal. 544.

7. A license for the exclusive use of a patented machine within certain territory does not continue longer than for the term of the original letters. *Union Paper-Bag Co. [Paper-Bag Cases]*, v. *Nixon*, 105 U. S. 766.

8. A contract for the use of a patent for a magnetic telegraph for telegraphing over a line between certain points, does not prevent other parties from conveying messages between the same points, under an assignment of a right to use the same patent if carried over other and more circuitous routes, the contract containing nothing forbidding it to be done. *Western Telegraph Co. v. Magnetic Telegraph Co.*, 21 How. 456; *Western Telegraph Co. v. Penniman*, Id. 460.

9. Where the patentee makes the experiments leading to his invention while employed at wages as a workman in a manufactory, and wholly at the expense of his employer, and after perfecting his invention and before applying for a patent therefor continues in his employment at increased wages for several months, and there uses the invention for his employer without any demand of compensation therefor, a license to the employer is to be presumed. *McClurg v. Kingsland*, 1 How. 202.

10. One in the lawful use and ownership of a patented machine, on the expiration of extended letters-patent, may continue in the use of it, although the patent be still further extended by special statute, there being in the statute nothing to deprive him of that right. [*McLEAN and NELSON, JJ., dissenting*] *Bloomer v. McQuewan*, 14 How. 539.

**PATENT — LICENSE — continued.**

11. If an inventor make no effort to conceal or protect his invention while experimenting with and perfecting it, but voluntarily permit the public to use it, one who makes a machine of the kind invented may lawfully use it after issue of a patent. *Kendall v. Winsor*, 21 How. 323.

12. But otherwise, if the inventor endeavor to conceal his invention, and assert his intention to secure a patent as soon as the invention is perfected, and the knowledge of the way in which his machine is constructed be surreptitiously obtained. *Id.*

13. *Semle* that the government has no right to use a patented invention, — a device for cancelling postage stamps and post-marking letters, for instance, — without compensation to the owner of the patent. [MILLER, J., doubting.] *James v. Campbell*, 104 U. S. 356.

14. Section 7, act of March 3, 1839 (5 Sts. 354), relating to the rights of those constructing or purchasing machines, etc., prior to the application of an inventor for a patent, has reference to an original application, not to a reissue. *Stimpson v. West Chester Railroad Co.*, 4 How. 380.

15. That section is not limited to patents for machines, manufactures, and compositions of matter, but extends to an invention of an improvement in the art of casting iron cylinders by giving a new direction to the tube which conducts the metal to the mould. *McClurg v. Kingsland*, 1 How. 202.

16. A covenant for the benefit of any "renewal" of a patent made in 1828 must be construed with reference to the law concerning renewals then existing, and does not embrace a new and distinct right created by a subsequent statute. *Wilson v. Rousseau*, 4 How. 646.

*Contract for Use during Continuance — Action for Payment.*

See CONTRACT—CONSTRUCTION, 32.

**PATENT — PATENTABILITY — What is patentable — In general.**

See pl. 1-16.

*What is not patentable, in general — What constitutes Invention.*

See pl. 17-64.

*Patentability as affected by Want of Novelty — What constitutes Want of Novelty.*

See pl. 65-75.

*Patentability as affected by Prior Public Use or Prior Publication — What constitutes such Use, etc.*

See pl. 76-90.

*Patentability as affected by Anticipation — What constitutes Anticipation.*

See pl. 91-111.

1. — *What is patentable — In general.*]  
To be patentable, it is not enough that a thing be

**PATENT — PATENTABILITY — continued.**

useful and that it be new, i. e., unknown in the same form. It must amount to an invention or discovery. *Thompson v. Boisselier*, 114 U. S. 1.

2. As a process and the product of a process may be separable and independent, they may both be patentable. *Providence Rubber Co. v. Goodyear*, 9 Wal. 788.

3. Changes in the construction and operation of an old machine, such as to adapt it to a new and valuable use, are patentable, whether consisting of a material modification of parts, or a change in their combination. *Seymour v. Osborne*, 11 Wal. 516.

4. An invention is useful in the sense of the patent law where it may be beneficially used for the purpose designed. It need not be of such general utility as to supersede all other inventions that can accomplish the same result. *Id.*

5. Where a process, although contemplating the use of known materials, and of steps some of which are not new, extends beyond the use of such materials, and results in a new product differing from products preceding it, not merely in degree of usefulness and excellence, but in kind, having new uses and properties, there is invention, and not merely a substitution of one material for another, or the mere exercise of mechanical judgment or taste. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486.

6. An invention of an improvement in making artificial teeth which consists of the making of a vulcanite dental plate of a vulcanizable rubber compound into which the teeth are embedded in its plastic condition, the whole being then vulcanized by heat so that teeth, gums, and plate are perfectly joined, without any intervening crevices, the plate, moreover, being lighter, more flexible, and less expensive than plates before in use, is patentable, not being the mere substitution of one known material for another, a new effect being introduced, and the differences between it and those before in use being too many and too great to be ascribed to mere mechanical skill. *Id.*

7. A stone-crushing machine consisting of two nearly upright convergent adjustable jaws, to one of which a limited and unvarying vibratory movement is imparted by a revolving shaft, a fly-wheel also being used to equalize the strain, is of practical value and utility, and patentable. *Blake v. Robertson*, 94 U. S. 728.

8. A combination for an improvement in looms for weaving pile fabrics, of which the elements consist of the rigid lay and shuttle-box, the pivoted vibrating trough, the reciprocating driving-slide riding on the trough, the latch for taking and holding the wire, and the operation or lifting of the latch by striking the wire-box, the effect of which is to cause a loom to produce fifty yards a day instead of forty, the most produced under appliances before in use, shows patentable invention. Such a combination is not a mere aggregation of old devices, and is not obvious. *Webster Loom Co. v. Higgins*, 105 U. S. 580.

**PATENT — PATENTABILITY — continued.**

9. Nor can it be contended that the third element, described as "the reciprocating driving-slide," is not the slide which rides upon the trough or wire-bar and carries the latch, but the slide which rides on the breast-beam and communicates the reciprocating motion to the other, the effect of the latter construction being to render the claim, practically, a nullity. *Ib.*

10. It is no objection to the validity of a patent for a combination that some of the elements of which it is composed are not new. *Brown v. Guild [The Corn-Planter Patent]*, 23 Wal. 181.

11. Nor is a patent for a combination void because each of the different elements thereof has been described at different times in different publications. *Imhaeuser v. Buerk*, 101 U. S. 647; *Parks v. Booth*, 102 U. S. 96.

12. A machine to drive several nails at once, consisting of grooved spring-jaws to hold and guide the nails, combined with an equal number of rising and falling plungers with globular collars to spread the jaws so as to allow the head of the nail to pass, is patentable as a combination, although the several parts are old. *Wicke v. Ostrum*, 103 U. S. 461.

13. While a new combination of constituents well-known and in common use may be patentable, if new and useful results are thereby produced, the results must be a product of the combination, — not a mere aggregate of results each the product of a single one of the combined elements. *Hailes v. Van Wormer*, 20 Wal. 353.

14. While the single fact that a device has gone into general use and has displaced other devices previously employed for analogous uses does not, in itself, show patentable invention, it may always be considered; and when the other facts in the case leave the question in doubt, may turn the scale. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486.

15. It is that which gives a distinctive appearance to the article to which it is applied which is protected by a patent for a design. Sameness of appearance is the principal test of identity in such case. *Gorham Manufacturing Co. v. White*, 14 Wal. 511.

16. It is not essential to such identity that appearances be identical to an expert, but only that they be so to the ordinary observer giving such attention as one usually gives to articles which he is about to purchase. *Ib.*

17. — *What is not patentable, in general — What constitutes Invention.* The mere substitution of one known material for another material previously used for making the same thing, does not constitute patentable invention. *Hotchkiss v. Greenwood*, 11 How. 248; *Hicks v. Kelsey*, 18 Wal. 670.

18. The use of potter's clay, for instance, to make a particular kind of door-knob, to be attached to the spindle in a particular way, is not patentable, that kind of knob attached in that way to the same kind of spindle being known,

**PATENT — PATENTABILITY — continued.**

and clay having been used to make other door-knobs, and the practicability of using it for that particular kind of knob being obvious to an ordinary mechanic acquainted with the business. [Woodbury, J., dissenting.] *Hotchkiss v. Greenwood*, 11 How. 248.

19. So the substitution of iron for wood and iron in the curve of a wagon-reach, the form of the reach, its purpose, and its mode of operation remaining the same. Nor is it of any consequence that the iron curve is the better one, — more solid and requiring less repair. *Hicks v. Kelsey*, 18 Wal. 670.

20. So the substitution of metal for wood in the making of corner sockets for the framework of show-cases is destitute of invention and not patentable. *Terhune v. Phillips*, 99 U. S. 592.

21. So an improvement in paper collars which consists merely of the paper composing them, they being identical in form, structure, and arrangement with collars previously made of paper of another quality and fabric, the patentee inventing neither the special paper used by him, nor the process by which it is obtained, will not support a patent. *Union Paper Collar Co. v. Van Dusen*, 23 Wal. 530.

22. A mere principle is not patentable; nor can there be an exclusive right to a new power. To constitute invention there must be an application to a useful purpose. *Le Roy v. Tatham*, 14 How. 156; *O'Reilly v. Morse*, 15 How. 62; *Smith v. Ely*, 15 How. 137; *Le Roy v. Tatham*, 22 How. 132; *Case v. Brown*, 2 Wal. 320. See *Burr v. Duryee*, 1 Wal. 531.

23. A claim, for instance, to the use of the motive power of the electric or galvanic current, for making or printing intelligible characters, signs, or letters at a distance, without restriction to particular machinery, is broader than the patent laws allow, and invalid. [Wayne, Nelson, and Grier, JJ., dissenting.] *O'Reilly v. Morse*, 15 How. 62. See *Smith v. Ely*, *Id.* 137.

24. A patent can be had, not for the function or abstract effect of a machine, but only for the machine itself. *Corning v. Burden*, 15 How. 252; *Burr v. Duryee*, 1 Wal. 531.

25. A patent for a mechanical device or combination of powers and devices, to perform some function and produce a certain effect or result, is a patent for a machine. *Corning v. Burden*, 15 How. 252.

26. The distinction between a patent for a machine and a patent for a process, explained. *Ib.*

27. The application by the patentee of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original in the sense of the patent law, is not the subject of a patent. *Brown v. Piper*, 91 U. S. 37.

28. Given the application to corpses of the degree of cold necessary to preserve them by means of a close chamber in which they are placed, and a freezing mixture having no com-

**PATENT — PATENTABILITY — continued.**

munication with the air in the preserving chamber, it is not invention to apply it in the same way to fish or meat. *Ib.*

29. A mode of turning down paper collars is not patentable where the same mode has been applied to linen collars. *Union Paper Collar Co. v. Van Dusen*, 23 Wal. 530.

30. That which is merely an improvement in degree, which merely extends or carries forward processes before used, is not patentable. *Smith v. Nichols*, 21 Wal. 112; *Roberts v. Ryer*, 91 U. S. 150.

31. A textile fabric, for instance, which is to be distinguished from that before made only by its higher finish and greater beauty of surface, the result of greater tightness of weaving, greater skill or care on the part of the workmen, or more perfect machinery. *Smith v. Nichols*, 21 Wal. 112.

32. The application of an old device to a new use is not invention. *Brown v. Guild [The Corn-Planter Patent]*, 23 Wal. 181; *Stephenson v. Brooklyn Cross-Town Railroad Co.*, 114 U. S. 149; *Western Electric Manufacturing Co. v. Ansonia Brass & Copper Co.*, 114 U. S. 447.

33. A patent for an improvement in machines for sawing boards, consisting in the use of two deflecting plates, one placed on each side of the circular saw, was held void for want of patentable invention, a single circular deflecting plate attached to one side of the saw to spread the wood after sawing to prevent its bearing against the side of the saw being known, and the second plate being attached for the same purpose and in the same manner. *Dunbar v. Myers*, 94 U. S. 187.

34. The putting of a pane of glass in the other side of a street-railroad fare-box, having a pane on the side towards the driver, is not invention and not patentable. *Dawson v. Grand Street Railroad Co.*, 107 U. S. 649.

35. Nor is the putting of an ordinary reflector by the head-light of the car at such an angle as to throw a light into the box through another pane of glass inserted for that purpose. *Ib.*

36. Given a bell-cord with pendent hand-straps or pulls running along the centre of the top of a street car, and bell-cords running along the sides of the top without such pendent straps or pulls, it is no invention to apply the pendent straps or pulls to the cords along the sides. *Stephenson v. Brooklyn Cross-Town Railroad Co.*, 114 U. S. 149.

37. The application of a mirror to the hood of a street car, over the head of the driver, and a glass panel to the door, in such manner that the driver may see the interior and rear of the car and people getting on and off, without turning, does not constitute a patentable combination. *Ib.*

38. Where a plain roller had been used in a certain combination to give a plain finish to leather, and a roller with a design thereon had been used in another combination to give a

**PATENT — PATENTABILITY — continued.**

"pebbled" finish, the placing of the design on a roller to be used in the former combination, was held not to constitute patentable invention, such a change involving simply mechanical skill. *Stimpson v. Woodman*, 10 Wal. 117.

39. The application of a cinder notch to a cupola furnace for the purpose of drawing off the slag when the furnace is used for the smelting of trough runners and the like, the use of the notch in the blast furnace for that purpose being old and well known, does not imply invention, and is not patentable. *Vinton v. Hamilton*, 104 U. S. 485.

40. Given a funnel or tube attachment designed to adapt steam-boilers to the use of straw as fuel, and given two kinds of boilers, a discovery that the funnel, which with one kind of boiler with which alone it has been tried is a failure, will succeed when applied to the other kind, is not patentable. *Heald v. Rice*, 104 U. S. 737.

41. Given a cored conical bolt with a screw-thread cut thereon, used in the making of safe locks, it is not invention to apply the thread to a solid conical bolt used in securing the plates of safe doors. *Hall v. Macneale*, 107 U. S. 90.

42. The application of the known device of an automatic valve, previously used on stationary steam fire-engines on ships, to portable steam fire-engines on land, does not involve invention, and is not patentable. *Blake v. San Francisco*, 113 U. S. 679.

43. While a device consisting of chamfering the edges of blocks of stone used in a street pavement, so as to make a foothold for horses, may constitute patentable invention, a device which, abandoning the chamfering process, consists merely of taking stone blocks in the form of parallelepipeds, with sufficiently rough sides, for the purpose, the size of the blocks and the degree of roughness of the sides being left to the judgment of those applying them, will not support a patent, pavements of stone in the form of parallelepipeds not being new, and the invention consisting, in effect, merely of a suggestion of the best kind of stone for the purpose. *Guidet v. Brooklyn*, 105 U. S. 550.

44. Given a double-pointed tack or staple with a bevel or diagonal cut on opposite sides of the points, it is no invention to make the bevel or cut on corresponding sides, so that as the tack or staple is driven the points will turn in the same direction. *Double-Pointed Tack Co. v. Two Rivers Manufacturing Co.*, 109 U. S. 117.

45. Nor to use such a staple, with a common washer on one point, in fastening a nail on a nail. *Ib.*

46. In a suit for infringement of a patent for an improvement in reed organs, it was held that in view of the state of the art there was no invention in making the length and size of the valve-opening either greater or less in a reed-board of a given width, or where the reed-board

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was made wider or narrower or had more or fewer sets of reeds, either full or partial. *Estey v. Burdett*, 109 U. S. 633.

47. There is no patentable invention in applying an old mode of attaching to a stove its projecting parts to attaching the base-pan to the stove. *Bussey v. Excelsior Manufacturing Co.*, 110 U. S. 131.

48. Given a certain kind of block for use in paving streets, a foundation of stone or gravel, and the filling of spaces between the blocks with gravel or sand, the bringing of them together does not involve invention. *Phillips v. Detroit*, 111 U. S. 604.

49. An adaptation of a patented article to the performance by the means employed under the patent, of a function which its structure and action would suggest to an ordinarily skilful mechanic, is not patentable. *Tucker v. Spalding*, 13 Wal. 453.

50. A device which consists merely of a stump or peg to prevent the rear part of a corn-planter from tipping back too far, is not patentable, it being such merely as any skilful mechanic would have devised and applied. *Brown v. Guild* [*The Corn-Planter Patent*], 23 Wal. 181.

51. There is no patentability in a device consisting of an ornamental chain for necklaces formed of alternate closed links and open spiral links, the latter being finished before they are sprung into the solid links, and the connection being made by springing the links together, instead of soldering them. There is merely the exercise of ordinary mechanical skill. *Pearce v. Mulford*, 103 U. S. 112.

52. The application of the power of a steam-engine to a vertical capstan by means of the old and familiar arrangement of shafts and cog-wheels before used in applying the power to a windlass, shows no patentable invention, only the ordinary judgment and skill of a trained mechanic being required to conceive or to execute the idea. *Morris v. McMillin*, 112 U. S. 244.

53. A device which, in effect, consists merely in passing a lead pencil through a piece of india-rubber, which by its own elasticity is kept in place at the head of the pencil, is not patentable. *Rubber-Tip Pencil Co. v. Howard*, 20 Wal. 498.

54. A combination, to be patentable, must produce a force, effect, or result different from that given by its separate parts; otherwise it is only an aggregation of separate elements. A combination, therefore, which consists only of the application of a piece of rubber to one end of a piece of wood which makes a lead pencil is not patentable. [DAVIS, STRONG, and BRADLEY, JJ., dissenting.] *Reckendorfer v. Faber*, 92 U. S. 347.

55. The uniting and compressing of several similar parcels of plastering hair in one bale, for convenience in transporting, is not invention, and not patentable. *King v. Gallun*, 109 U. S. 99.

56. A device in connection with a revenue

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stamp for barrels, consisting of a removable slip of metal so attached to the paper stamp that the removal of the slip must mutilate the stamp, although new and of superior utility in preventing frauds on the revenue, does not show invention. *Hollister v. Benedict & Burnham Manufacturing Co.*, 113 U. S. 59.

57. If a product is not new, it cannot be the subject of a patent, although the process which produces it may be; as, for instance, paper pulp extracted from wood by chemical agencies alone, which is the same substance as paper pulp obtained from vegetable substances by chemical and mechanical processes. *American Wood-Paper Co. v. Fibre Disintegrating Co.* [*The Wood-Paper Patent*], 23 Wal. 566.

58. While a process producing a known substance, *e. g.*, alizarine of madder, is patentable, the product of itself is not, although artificially produced from a substance other than madder. *Cochrane v. Badische Anilin- & Soda Fabrik*, 111 U. S. 293.

59. The use, not in combination, but in succession, of two things not separately claimed as patentable, is not a patentable combination. *Beecher Manufacturing Co. v. Atwater Manufacturing Co.*, 114 U. S. 523.

60. A patent for a combination can be supported only on its novelty; not on its fitness to be used to make a better article by rendering available a newly discovered property of the material employed. *Le Roy v. Tatham*, 14 How. 156.

61. Thus, a claim of a combination of machinery "when used to form pipes of metal, under heat and pressure, in the manner set forth, or in any other manner substantially the same," cannot be supported on a discovery of a property in lead by means of which it can be used to make a new kind of pipe. *Id.*

62. A combination is not patentable unless the function of one part modifies that of another, — unless the combination is a new machine of distinct character and function, or produces a result not the mere aggregate of separate contributions. *Pickering v. McCullough*, 104 U. S. 310.

63. There can be no patentable combination of a portable reservoir of a stove, with a flue in its rear and a base-pan beneath it. *Bussey v. Excelsior Manufacturing Co.*, 110 U. S. 131.

64. Nor between a damper for the middle flue of a three-flue stove and a base-pan or warming-closet. *Id.*

65. — *Patentability as affected by Want of Novelty — What constitutes Want of Novelty.* [An article, to be new within the meaning of the patent law, must differ from the old by being more or less efficacious, or possess new properties by a combination with other ingredients. *Milligan & Higgins Glue Co. v. Upton*, 97 U. S. 3.

66. A mere change in the form of a soluble article of commerce, the comminution of the ordinary angular flakes of glue, for instance, by reducing it to small particles so that it may more

**PATENT — PATENTABILITY — continued.**

readily be put in solution and more easily handled, and may have an improved appearance and be therefore more salable, does not make it a new article within the meaning of the patent law. *Ib.*

67. A patent for "an alleged new and useful improvement in ladies' hair nets," held void because the specification and claim described various fabrics which had long been well known and in public use previous to the application; i. e., a set of meshes of coarse thread combined with another set of finer and nearly invisible thread to fill the spaces. *Dalton v. Jennings*, 93 U. S. 271.

68. A patent for a shovel-plough which does not claim the inclined shovel mould-board, nor the principle of passing the earth over the recess of the plough into the furrow behind, nor the passage of the earth over a recess in the mould-board, formed exclusively with a curved edge, the edge being described merely as "scalloped out so as to form a recess," shows no novelty. *Eddy v. Dennis*, 95 U. S. 560.

69. A patent for an improvement in rings, like martingale rings, the ring consisting merely of a metal core with a covering of a composition like artificial ivory, applied in a plastic state, is void for want of novelty, the patent being for a product, not a process, and both ring and compound being old. *Rubber-Coated Harness-Trimming Co. v. Willing*, 97 U. S. 7.

70. There is no novelty in the use of gold tubing, itself an old article, in making links of a chain of a spiral form. *Pearce v. Mulford*, 102 U. S. 112.

71. A patent for an oil-tank car declared void for want of novelty and utility, there being no exercise of the inventive faculty, and the claims clearly being frivolous. *Densmore v. Schofield*, 102 U. S. 375.

72. A process consisting of thoroughly cooking meat in water heated to the boiling-point, of removing the bone and gristle, of pressing the warm meat into a case with force sufficient to remove superfluous air and moisture, so as to make the meat form a solid cake, and of closing the case air-tight upon the meat, shows neither novelty nor invention. *Wilson Packing Co. v. Chicago Packing & Provision Co.* [*Packing Company Cases*], 105 U. S. 566.

73. Nor can a process described substantially as above be deemed to embrace the subjecting of the cases to the Appert process after they are packed and sealed, and the cooking of the meat in water first heated to the boiling-point, and therefore to be patentable as a new combination, these elements not being included in the claim. *Ib.*

74. An improvement in trucks for locomotive engines, which consists simply in the application of the old contrivance of a railroad-truck swivelling upon the king-bolt, with transverse slot and pendent divergent links, already in use under railroad cars, to the analogous purpose of forming the forward truck of a locomotive engine,

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there being no novelty in the mode of application, does not show patentable invention. *Pennsylvania Railroad Co. v. Locomotive Engine Co.*, 110 U. S. 490.

75. Upon the question of the novelty of a patented invention, the time of the invention, not the time of the application for the patent, fixes priority. *Klein v. Russell*, 19 Wal. 433.

76. — *Patentability as affected by Prior Public Use or Prior Publication — What constitutes such Use, etc.* Under the act of 1793, if the thing patented had been in use, or had been described in a public work, anterior to the supposed discovery by the patentee, the patent was void. *Evans v. Eaton*, 3 Wheat. 454; *Evans v. Eaton*, 7 Wheat. 356.

77. So if the inventor had suffered the thing invented to go into public use, or to be publicly sold for use, before applying for a patent. *Pennock v. Dialogue*, 2 Pet. 1.

78. Whatever the intention of the inventor, if he suffer his invention to go into public use by any means whatever, without an immediate assertion of his right, he is not entitled to a patent. *Shaw v. Cooper*, 7 Pet. 292.

79. What delay of the inventor in obtaining a patent, and what use by the public before application, will defeat the inventor's right thereto. *Ib.*

80. Under Rev. Sta. § 4886, public use for more than two years with consent of the inventor avoids the patent. *Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92; *Munroe v. Cape Ann Isinglass & Glue Co.*, 108 U. S. 462.

81. The use of an invention by the inventor or by others under his direction, made in good faith, solely to test its qualities, remedy its defects, and bring it to perfection, is not a public use of it within the meaning of the patent law, although others thereby derive a knowledge of it. *Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126.

82. Where an inventor of a wooden pavement, therefore, for the purpose of testing it, puts down a small section of it, at his own expense, on a public road belonging to a corporation which receives tolls, and of which he is a stockholder and the treasurer, there is no public use of the invention such as should deprive the inventor of the benefit of his patent. *Ib.*

83. Where an inventor gives the invented article, without restriction or injunction of secrecy, to another to be used, its use by the donee is public within the meaning of the statute, although the article, a corset-spring, for instance, is such that its use is in its nature private. [MILLER, J., dissenting, holding a private use which leads to no reproduction, and which leaves the public at large as ignorant as before the invention, no abandonment.] *Egbert v. Lippmann*, 104 U. S. 333.

84. So where an inventor sells a safe with the plates of the door secured by conical bolts screwed into the plates, the ends of the bolts being flush

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with the surfaces of the door, there is a public use of the bolts. *Hall v. Macneale*, 107 U. S. 90.

85. There is a public use such as to defeat a patent where the invention is of a process, made by a workman in a manufactory, communicated by the inventor to his employer and others, and openly used in the factory for several years. *Worley v. Tobacco Co.*, 104 U. S. 340.

86. The consequences of such use are not altered by an assignment by the inventor to his employer of an interest in the invention. *Ib.*

87. A previous publication, to invalidate the patent, must be such as to enable a person skilled in the art to which the invention relates to make the article described. *Seymour v. Osborne*, 11 Wal. 516; *Cohn v. United States Corset Co.*, 93 U. S. 366; *Downton v. Yeager Milling Co.*, 108 U. S. 466. See *Sewall v. Jones*, 91 U. S. 171.

88. But a prior publication may defeat the patent, although it does not describe the invention perfectly in every detail, if the defects of description are such as mere mechanical skill unaided by invention might remove. *Pickering v. McCullough*, 104 U. S. 310.

89. A patent for an improvement in corsets issued on a specification of slots or pockets for the bones, closed or stopped in the weaving, and "varying in length relatively to each other as desired," a woven corset with pockets closed at a uniform distance from the edge being disclaimed, is invalidated by a previous publication describing an invention differing from the specification only in being silent as to variation in the length of pockets. *Cohn v. United States Corset Co.*, 93 U. S. 366.

90. A patent cannot be sustained under the act of 1836 where the invention was known previously to at least five persons, and probably to many others, and was tested, shown to be successful, and used. *Coffin v. Ogden*, 18 Wal. 120.

91. — *Patentability as affected by Anticipation — What constitutes Anticipation.* A machine anticipates an invention of a machine in no respect materially different except in being larger and stronger, and so better fitted for heavy work. *Woodbury Patent Planing-Machine Co. v. Keith*, 101 U. S. 479.

92. In order that an invention may have effect as an anticipation of a subsequent invention, it is not material that the inventor perceive and state all its advantages. *Stow v. Chicago*, 104 U. S. 547.

93. A refrigerator with an open-bottom ice-box, and a partition with openings at the top and bottom so arranged that the air cooled by the ice will descend in one compartment and ascend and return to the ice by the other, is anticipated by one in which the cold air descends by a mere conduit, although in the former the descending current is chiefly used for refrigeration, and in the latter the ascending. *Roberts v. Ryer*, 91 U. S. 150.

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94. A process for preserving Indian corn in the green state by removing the kernels from the cob, putting them in cans and exposing the sealed cans to heat of the temperature of boiling water, puncturing, resealing while hot, and heating again, is anticipated by a process for preserving any kind of food, animal or vegetable, by putting it, in whatever form, whether intact or still in its husks, into sealed cans, and submitting the cans to heat gradually raised to the like temperature, and after a suitable time gradually lowered again, although the specification of the former recommends a particular way of removing the kernels from the cob. Such recommendation is not of the substance of the process. [CLIFFORD, J., dissenting.] *Sewall v. Jones*, 91 U. S. 171.

95. A bar or cross-piece for connecting shawl straps and handle, made stiff by the addition of metal, is anticipated by a bar made stiff in a degree by the use of the firmest leather doubled and stitched. *Cranch v. Roemer*, 103 U. S. 797.

96. An invention of a pavement of alternate tiers of square-ended and wedge-shaped blocks on a foundation of gravel or earth, the wedge-shaped blocks being driven to pack the gravel or earth, is anticipated by a pavement differing only in having the square-ended blocks octagonal in form and in contiguous rows, and the wedge-shaped ones driven in the remaining square spaces. *Stow v. Chicago*, 104 U. S. 547.

97. An invention of a combined step-cover and wheel-fender, consisting merely of a broad plate fastened rigidly to the lower part of the carriage door and extending downward over the step, is anticipated by a rigid vertical bar attached to the door with a broad plate projecting from its lower end and covering the step. There is no difference in principle or in mode of operation, but only of shape. *Gosling v. Roberts*, 106 U. S. 39.

98. An invention of a dredging boat with two propellers at the stern and a mud-fan at the bow somewhat like a propeller, designed to stir up the mud at the bottom, and with water-tight compartments so proportioned and arranged that the boat may be sunk and brought into position to work effectively in various depths of water, is anticipated where the water-tight compartments and propellers not materially different have been severally used on different boats, and the selection and combination of elements is only what might be made by mechanical skill. *Atlantic Works v. Brady*, 107 U. S. 192.

99. An invention of an improvement in making artificial teeth which consists of the making of a vulcanite dental plate of a vulcanizable rubber compound, so that teeth, gums, and plate are perfectly joined, without crevices, is not anticipated by experiments which consisted of casting in moulds sets of teeth on a tin base, but from which a tight joint could not be produced, the metal, also, shrinking in cooling, and the experiments for these and for other reasons being aban-

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doned. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486.

100. A patent for an improvement in swage-blocks used for welding and re-forming the shattered ends of railroad rails, consisting of a large anvil with a fixed raised iron block on top nearly as high as a rail, with one face shaped to fit the side of a rail, and a block of the same height with its opposing face shaped to fit the other side of the rail, the latter block being so arranged as by the operation of a cam to move up and grasp a rail placed between the two blocks, is not anticipated by the ordinary angle-iron machine consisting of two blocks, one fixed and the other movable, the former machine holding the rail by the sides with the anvil as a base so that the work of hammering and forming the rail is not done on top of the blocks, while the latter holds one bar of the iron which is to form the angle as in a vise with no base for the bar itself, while the other bar is welded to it and the angle is formed by hammering on top of the blocks. *Illinois Central Railroad Co. v. Turrill* [*Cawood Patent*], 94 U. S. 695.

101. Nor by the bayonet machine, which is in form and substance nothing more than a hinge-vise with jaws so shaped that their lateral surfaces come into contact except for a short space equal to the diameter of a bayonet shank, and used to merely hold the lower segment of the shank in an upright position while the upper segment is turned over. *Ib.*

102. Nor by a machine consisting of a stationary die, part of a frame against which one side of a rail is placed, to resist lateral pressure exerted on a sliding die on the other side of the rail and pressure on another die from above, there being no anvil, and apparently no way in which the rail may be worked on from above. *Ib.*

103. A stone-crushing machine, consisting of two nearly upright convergent adjustable jaws, to one of which a limited and unvarying vibratory movement is imparted by a revolving shaft, a fly-wheel also being used to equalize the strain, is not anticipated by an ice-crushing machine consisting of a hopper with one movable side, the other sides having projections to split the ice, the motive power being supplied by a hand-lever and converging adjustable jaws, revolving shaft, and fly-wheel being wanting. *Blake v. Robertson*, 94 U. S. 798.

104. Nor is it anticipated by an ore-crushing machine consisting of a cylindrical nut or pestle in a basin, a crushing motion being communicated to the pestle by a lever attached, there being here neither converging jaws, revolving shaft, nor fly-wheel. *Ib.*

105. A lubricator in which the lubricant is forced from the cup or reservoir by hydrostatic pressure applied through a pipe entering the reservoir near its bottom and in which the lubricant is kept separate from the water by the difference in gravity, is different from one in which a pipe is

**PATENT — PATENTABILITY — continued.**

made to enter in like manner for the purpose of melting the lubricant; and an invention of the latter does not anticipate the invention of the former. *Garratt v. Seibert*, 98 U. S. 75.

106. An invention of a steak-broiler, consisting of an upright metal cylinder with a lid at the top, an open bottom traversed through the middle by a V-shaped trough filled with a substance which is a non-conductor of heat, and each side of which the flame may ascend in equal sheets, the whole so arranged that the steak, clasped by a wire holder, may be placed vertically in a dripping-pan placed in the trough, and so broiled on both sides equally and at the same time, and the juice of the meat be thereby saved, is not anticipated by a broiler having no such trough, and no arrangement for evenly distributing the flame along the two sides of the meat, although consisting of a cylinder with an opening in the bottom and a fixed vertical wire arrangement for holding the steak. *Sharp v. Dover Stamping Co.*, 103 U. S. 250.

107. Nor by one consisting of a broiling chamber with a vertical steak-holder close to one side of the chamber, a removable side having a pan to catch the gravy attached at the bottom, a central opening for the flame, and two deflectors intended to distribute the heat evenly, there being no such trough, and the proper distribution of the heat not being effected. *Ib.*

108. An invention for adapting the bat-wing burner to the burning of air-gas, consisting in perforating the base of the burner tube, surrounding the burner with a tube open at the top but closed at the bottom, and united to the burner below the perforations, thereby furnishing a regulated supply of gas outside of the burner, directed toward the tip and increasing the steadiness and power of the flame, is not anticipated by a bat-wing burner slitted nearly to its base, with a surrounding-tube smaller at top than at bottom, so arranged as, on being screwed down on the tube, to press against a conical part of the tube near its top and close the slit, although by not screwing the tube down as originally intended an additional outside supply of gas might be obtained, the tube not having been used in that way. *Clough v. Barker*, 106 U. S. 166.

109. Given the former of those combinations, the application thereto of a tubular regulating valve carried by an adjustable cylinder inserted within the burner tube is not anticipated by a burner in which the regulating valve is carried by the surrounding tube on the outside. *Ib.*

110. Nor does it anticipate a combination which, although like it in principle, in its method of supplying additional gas, and in its valve arrangement for regulating the supply, differs from it in dispensing with one of the pieces, in being less expensive, and in keeping the burner and the flame always in the same position instead of turning them around in regulating. *Clough v. Gilbert & Barker Manufacturing Co.*, 106 U. S. 178.



**PATENT — PATENTABILITY — continued.**

111. Given several inventions of washboards made of sheet-metal with the surface broken into variously shaped protuberances formed of the body of the metal, a patent for a washboard with protuberances of a different shape will not preclude the issue of a patent to another for a washboard with protuberances of still a different shape, the difference being substantial and not colorable. *Duff v. Sterling Pump Co.*, 107 U. S. 636.

*Identity between things, in general.*

See **PATENT — INFRINGEMENT.**

**PATENT — POWER OF CONGRESS — Power to modify the Rights of the Patentee after Issue of the Patent — To decide that one is the Inventor.]** Congress has power to modify the rights of a patentee and of the public in a patent-right after issue of the patent, if it does not thereby take away existing rights to property. *McClurg v. Kingsland*, 1 How. 302.

2. *Quære*, whether congress may decide that one is the inventor of a certain thing so as to preclude judicial inquiry. *Evans v. Eaton*, 3 Wheat. 454.

**PATENT — REISSUE — Right to surrender for a Reissue — Lost by Laches.**

See pl. 1-9.

*Reissue must not be on a Claim different from the Original — Identity, presumed, when open to Proof, how determined — Reissue void as to Matter disclaimed.*

See pl. 10-45.

*When Application for Reissue is complete — Effect of Surrender and Reissue — Power of Officers to accept a Surrender.*

See pl. 46-59.

1. — *Right to surrender for a Reissue — Lost by Laches.]* One may surrender his patent, and by an amendment cure the defect by which it is rendered invalid, as well where the defect is in the claim as where it is in the specification. *Battin v. Taggart*, 17 How. 74.

2. Such amendment of a defective claim will protect the right of the patentee to everything within the scope of the original invention. *Ib.*

3. Thus, one took a patent merely for the combination of an apparatus for breaking coal, of which he was the inventor, with an apparatus for screening, which he did not invent, and afterwards surrendered it, and took another for the breaking apparatus alone, it was held that he did not deprive himself of the right to a patent for the breaking apparatus by describing it and not claiming it on the issue of the first patent. *Ib.*

4. Where an inventor limits his original claim and takes out a patent with a claim narrower than his invention, through a mistake of the commissioner of patents in supposing the original claim to cover prior inventions, the commissioner, on discovering his mistake, may grant a

**PATENT — REISSUE — continued.**

reissue with the broader claim; and if the reissue secure nothing more than was covered by the original claim, it will be valid. *Morey v. Lockwood*, 8 Wal. 230.

5. Where a new patent is granted on surrender of the original, for alleged defective or insufficient specification, the specification cannot be charged in substance, either by the addition of new matter or by the omission of important particulars, so as to enlarge the scope of the invention, but, in general, only to render it more definite and certain, so that it may embrace the claim made. *Russell v. Dodge*, 93 U. S. 460.

6. The patentee, and his representatives as well, may, on a reissue, enlarge or restrict the claim so as to give it validity and secure the invention. *Providence Rubber Co. v. Goodyear*, 9 Wal. 788.

7. The right to a reissue may be lost by laches. *Johnson v. Flushing & North Side Railroad Co.*, 105 U. S. 539. And see *Gage v. Herring*, 107 U. S. 640.

8. A reissue cannot be granted for the purpose of enlarging a claim, unless the application for the reissue is made with due diligence. If the application is delayed for four years the reissue is void, no sufficient excuse for the delay being shown. [MILLER, J., dissenting.] *Mahn v. Harwood*, 112 U. S. 354.

9. A reissued patent is within the spirit of that provision of the law which permits the patentee, when through inadvertence, accident, or mistake he has claimed more than that of which he was the original inventor, to surrender his patent and take out a reissue. *Gage v. Herring*, 107 U. S. 640.

10. — *Reissue must not be on a Claim different from the Original — Identity, presumed, when open to Proof, how determined — Reissue void as to Matter disclaimed.]* A reissued patent must be for the same invention which formed the subject of the original, or, where divisional reissues are granted, for a part thereof. It must contain nothing substantially new or different. *Giant Powder Co. v. California Powder Works*, 98 U. S. 126.

11. The final clause of Rev. Sts. § 4916, which provides that amendments may be made in certain cases on proof satisfactory to the commissioner that the new matter was a part of the original invention and was omitted by mistake, etc., does not alter the rule. *Ib.*

12. *Quære*, whether that clause relates to all patents, or only to patents for machines. *Ib.*

13. Where a patent fully and clearly describes and claims a complete specific invention, and is not inoperative or invalid by reason of a defective or insufficient specification, a reissue cannot be had for the purpose of expanding and generalizing the claim so as to cover an invention not specified in the original. *James v. Campbell*, 104 U. S. 356; *Clements v. Odorless Excavating Apparatus Co.*, 109 U. S. 641.

**PATENT — REISSUE — continued.**

14. Where the original patent is operative and valid, and the specification sufficient, a surrender of the patent merely to insert in the reissue expanded or equivocal claims is an abuse of the privilege accorded by the law. *Burr v. Duryee*, 1 Wal. 531, 579.

15. Devices or ingredients not described nor substantially indicated in the original specifications, drawings, or model cannot be interpolated on a reissue. *Seymour v. Osborne*, 11 Wal. 516.

16. General claims inserted in a reissued patent will be carefully scrutinized, and will not be permitted to extend the rights of a patentee beyond what is shown by the history of the art to have been his invention. *Carlton v. Bokee*, 17 Wal. 463.

17. Where the claim of the reissued patent is for an invention different from that described in the original patent, the reissue is as to such claim void. *Ball v. Langles*, 102 U. S. 128; *Mathews v. Boston Machine Co.*, 105 U. S. 54; *Wing v. Anthony*, 106 U. S. 142; *Moffitt v. Rogers*, 106 U. S. 423; *Hoffheins v. Russell*, 107 U. S. 132; *McMurray v. Mallory*, 111 U. S. 97.

18. So a reissued patent is void if it embraces a claim broader than that on which the original was issued. *Hopkins & Dickinson Manufacturing Co. v. Corbin*, 103 U. S. 786; *Mathews v. Boston Machine Co.*, 105 U. S. 54; *Coon v. Wilson*, 113 U. S. 268. And see *Miller v. Bridgeport Brass Co.*, 104 U. S. 350.

19. An original patent for an improvement in paper collars, which describes a particular kind of paper coated in a certain way, will not support a reissue which describes a different kind of paper without such coating. *Union Paper-Collar Co. v. Van Dusen*, 23 Wal. 530.

20. Where an original patent for an oven makes no provision for conducting into it the products of combustion, except in a trifling degree through small perforations in the flues, the interior chamber of the oven being heated for baking by heat radiating from its walls, a reissue which claims a wholly different mode of heating the chamber, necessitating a radical change in the construction of the oven, which is made a part of the passage-way for the products of combustion from the fire-chamber to the chimney, is not for the invention embraced in the original patent, and therefore is void. *Ball v. Langles*, 102 U. S. 128; *Garneau v. Dozier*, Id. 230.

21. Where the claim of an original patent is for a specific water-wheel and associated apparatus, while the claims of a reissue, if construed literally, would give to the patentee a monopoly of all water-wheels having simultaneously an effective inward and downward flow and discharge, whatever the shape of the floats or of the crown, no such invention being described or suggested in the original, a construction which, in a suit by the patentee for infringement, limits the reissue to accord with the original, affords to the patentee no ground for complaint. *Swain*

**PATENT — REISSUE — continued.**

*Turbine & Manufacturing Co. v. Ladd*, 102 U. S. 408.

22. A reissue for a lamp-burner with a single dome with a chimney, held invalid, where the original was for a burner with a double dome without a chimney, the invention, on the issue of the original, being supposed to consist of the double dome as a means of dispensing with a chimney. *Miller v. Bridgeport Brass Co.*, 104 U. S. 350.

23. Where the original patent for a device for post-marking letters and cancelling stamps is upon a claim for a metal tube or cylinder at each end of a metal bar affixed to a handle, the cylinder to contain type or blotters of "wood, cork, rubber, or any similiar material," the advantage claimed being assigned to the yielding character of the material used, a reissue on a claim of any substantial equivalent for the tube containing type or blotters, or for the type or blotters, is invalid, the use of the bar and handle having been anticipated. *James v. Campbell*, 104 U. S. 356.

24. A reissued patent for a broad plate attached to the lower end of a carriage door, in combination with the door and the step, to operate, when the door is closed, as a step-cover, and when the door is open as a wheel-fender, the plate to be either flexible or otherwise, and connected at its lower end with the step or not, is for an invention different from that covered by an original patent for a combined step-cover and wheel-fender, consisting of a flexible plate attached at its upper end to the door, and at its lower to the step or other fixed object, the flexibility of the plate serving to hold the door in position either open or closed. *Gosling v. Roberts*, 106 U. S. 39.

25. A reissued patent for the bringing of different portions of a plate successively into the field of the lens of a camera, held to be for an invention different from that covered by an original patent for a plate-holder in combination with the frame in which it moved, constructed and operated for the same purpose, and therefore invalid. *Wing v. Anthony*, 106 U. S. 142.

26. A claim in an application for a reissue of a patent for an improvement in the manufacture of heel-stiffeners for boots of a "former" circular in cross-section, concentrically set, and revolving in the semicircular groove of a stationary mould, by which the material is pressed against the former, is different from a claim of an elongated heel-shaped former eccentrically set on its shaft, against which the material is pressed by a revolving roller or rollers. *Moffitt v. Rogers*, 106 U. S. 423.

27. Where the original claim is for a revolving harvester-rake with an inclined rake-post attached to the platform, there cannot be a reissue on a claim for a rake-post attached to the platform or to the finger-beam, there being no apparent way nor any description of one, in which the rake can be made to work with the

**PATENT — REISSUE — continued.**

post fastened to the beam. *Hoffheins v. Russell*, 107 U. S. 132.

28. An original patent for a soldering machine for sealing fruit-cans, etc., which consists of a rod to hold the cap of the can in place in combination with a hollow iron disk to be heated and rotated on the rod on the line joining the cap with the can, does not justify a reissue on a claim of the rod in combination with a soldering iron of the ordinary form hinged to the rod and moving radially around it. *McMurray v. Malory*, 111 U. S. 97.

29. A patent for a device for turning or rolling logs to or upon a carriage will not support a reissue for a device adapted, not only to turn the logs on their axes, but to roll them from one place to another, a change of mechanism being required, and the scope of the reissue being much enlarged. *Torrent Arms Lumber Co. v. Rodgers*, 112 U. S. 659.

30. Where a patent is granted for a combination of certain ingredients, a reissue covering a combination of a part only of the same ingredients is void; the reissue in such case is not for the same invention as the original. *Gill v. Wells*, 22 Wal. 1.

31. So where the reissue, instead of covering a combination of parts specified in the original patent, omits one of these parts and substitutes others for it, it not appearing that the parts substituted are the known equivalents of the part omitted. *Ib.*

32. A patent for a combination will not support a reissue which claims separately elements of the combination. *Matheus v. Boston Machine Co.*, 105 U. S. 54; *Bantz v. Frantz*, Id. 160.

33. A reissued patent for "the combination of a straw-feeding device with the furnace door" of a boiler of a particular kind, held to be for an invention different from that covered by the original, which was for "certain improvements in the construction of steam-boilers," whereby, as the patentee declared, he was enabled to utilize straw, etc., for fuel, and therefore invalid. *Heald v. Rice*, 104 U. S. 737.

34. Where, in the reissue, several of the devices essential to the combination described in the original patent are omitted, and a separate claim is made for the parts which remain, and to these parts a new and essential function is given, which, under the original patent, they could not perform, the reissue is not supported by the original. *Johnson v. Flushing & North Side Railroad Co.*, 105 U. S. 539.

35. To claim, on a reissue of a patent for a combination, a combination of a part only of the elements of the combination claimed on the issue of the original, is, in effect, to enlarge the original claim, and to render the reissue as to that claim invalid. While a combination of the lesser number of elements would not infringe the original patent, it would infringe the reissue. *Gage v. Herring*, 107 U. S. 640.

**PATENT — REISSUE — continued.**

36. A patent for a process which consists of three stages or distinct processes for obtaining paper pulp from wood, will not support a reissue for a process whereby it is produced by a single operation or in one stage. *American Wood-Paper Co. v. Fihre Disintegrating Co.* [*The Wood-Paper Patent*], 23 Wal. 566.

37. An original patent for a process will not support a reissue for a compound, unless the compound is the result of the process, and the invention of the one involves the invention of the other. *Giant Powder Co. v. California Powder Works*, 98 U. S. 126.

38. A patent for a machine for making use of a process does not justify a reissue covering a claim for the process itself. *James v. Campbell*, 104 U. S. 356.

39. A reissue is not invalid because the process is not so minutely described in the original patent as in the reissue, if the process is clearly the same, and if the description in the original is full enough to be understood and applied. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486.

40. Where a patent is surrendered and a new patent issued, differences in description or specification of claim are not of necessity inconsistent with the identity of the thing intended to be patented in the one case with that patented in the other, it being one object of a surrender to correct the description or claim, or both. *O'Reilly v. Morse*, 15 How. 62.

41. It may be shown, in a suit on a reissued patent, that the patent covers matter not embraced in the original invention. *Eureka Clothes-Wringing Machine Co. v. Bailey Washing & Wringing Machine Co.*, 11 Wal. 488.

42. The identity of invention in the original and the reissued patent is a matter for comparison, to be made by the court, aided by the testimony of experts for the explanation of technical terms, if any. *Seymour v. Osborne*, 11 Wal. 516.

43. The question is one of law, whenever it can be determined solely from the face of the patents by mere comparison, without the aid of evidence to explain terms of art or to apply the descriptions to the subject-matter. *Heald v. Rice*, 104 U. S. 737.

44. A reissue is presumed to be for the same invention as the original patent. *O'Reilly v. Morse*, 15 How. 62; *Klein v. Russell*, 19 Wal. 433; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486.

45. A reissue which covers matter disclaimed by the patentee, such disclaimer having been required by the commissioner of patents as a condition on which an extension would be granted, is, as to such matter, void. *Leggett v. Avery*, 101 U. S. 256; *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624.

46. — *When Application for Reissue is complete — Effect of Surrender and Reissue*

**PATENT — REISSUE — continued.**

— *Power of Officers to accept a Surrender.*] Where an applicant for a reissue has done all in his power to make his application effectual, i. e., has filed it and paid the fees, it is to be considered as properly before the commissioner. *Patent Commissioner v. Whiteley*, 4 Wal. 522.

47. Prior to the act of 1870, a patent surrendered for reissue was cancelled in law when the application for reissue was refused as well as when it was granted. *Peck v. Collins*, 103 U. S. 660.

48. And although that act (Rev. Sts. § 4916) provides that the surrender shall take effect upon the issue of the amended patent, it would seem that, where the patentee's title is disputed and adjudged against him, a refusal would still have the same effect. *Ib.*

49. Where a patentee has surrendered his patent for a reissue, and made oath that he believes it is inoperative and void by reason of an insufficient or a defective specification, and has taken out a reissue on new specifications and claims, he cannot revive and restore the original, merely by filing in the patent office a disclaimer of all changes made by the reissue. *McMurray v. Mallory*, 111 U. S. 97.

50. If a patent be surrendered for defective specification and a new one issued, the rights of the patentee are to be determined by the law in force when the original patent was issued. *Shaw v. Cooper*, 7 Pet. 292.

51. Reissued patents relate back to the issue of the original, so that a declaration alleging that an improvement consisting really of one principal and three distinct minor improvements was patented on a certain day is supported by proof that several reissues were afterwards granted on an original patent of that date, describing in its specification all and no more than was specified in the reissues. *Read v. Bowman*, 2 Wal. 591.

52. Under the act of February 21, 1793 (1 Sts. 318), the secretary of state had power to receive a surrender of a patent, cancel the record thereof, and issue a new patent for the unexpired portion of the term, if the defect in the specification arose from mistake, without fraud or misconduct of the patentee. *Grant v. Raymond*, 6 Pet. 218. See *Shaw v. Cooper*, 7 Pet. 292.

53. Where letters-patent have been extended under the act of July 4, 1836 (5 Sts. 124), the commissioner of patents may accept a surrender, and reissue amended letters after the expiration of the original term. *Wilson v. Rousseau*, 4 How. 646.

54. Where application for a reissue is made by one other than the patentee, it is the duty of the commissioner to determine whether the applicant is an assignee, and an assignee of such an interest as to be entitled to a reissue. *Patent Commissioner v. Whiteley*, 4 Wal. 522.

55. The decision of the commissioner in accepting a surrender of an old patent and issuing a new one closes the question whether the re-

**PATENT — REISSUE — continued.**

newal was within the statute, and leaves open to inquiry the question of fraud only. *Stimpson v. West Chester Railroad Co.*, 4 How. 380.

56. The act of the commissioner in accepting a surrender and granting a reissue is not reviewable, unless it appear on the face of the patent that he exceeded his authority, or that there is a repugnancy between the two patents, such that it must be held as matter of legal construction that the reissue is not for the same invention. *Seymour v. Osborne*, 11 Wal. 516.

57. Although the action of the commissioner in granting a reissue, within the limits of his authority, is not open to collateral impeachment, yet, as his authority is limited to a reissue for the same invention, the two patents may be compared to determine the identity of the invention; and if the new patent, when compared, appears on its face to be for a different invention, it is void, the commissioner having exceeded his authority in issuing it. *Russell v. Dodge*, 93 U. S. 460.

58. The surrender of a patent for the purpose of a reissue, under the act of 1836, is a legal cancellation of it. *Moffitt v. Garr*, 1 Black, 273.

59. A reissued patent need not recite that the prerequisites of a reissue have been complied with. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Pet. 448.

, *Proceeding to vacate Extension not cognizable in Equity.*

See EQUITY — JURISDICTION, 40.

**PATENT — VALIDITY — Grounds of Invalidity — Various Cases.]**

A patent for the whole of a machine is invalid if the invention consist merely of an improvement of an existing machine. *Evans v. Eaton*, 7 Wheat. 356; *Evans v. Hettich*, Id. 453.

2. There is no substantial difference between a patent for an improved machine and one for an improvement on a machine. *Evans v. Eaton*, 3 Wheat. 454.

3. Where it is evident on the face of letters-patent for a composition of matter that the proportions are so vaguely stated that one skilled in the art with which the composition is most nearly connected could not make it by following the directions given, without experiment, the court will declare the patent void. *Wood v. Underhill*, 5 How. 1.

4. But where a clear and specific general direction is given, and it does not appear to be inapplicable as a general rule, the patent may be valid, although it show that from the varying qualities of the materials employed the general rule sometimes must be departed from. *Ib.*

5. The prior construction and use in a single instance of a patented article, never made public, and finally forgotten or abandoned, so that at the time of invention by the patentee the invention has no existence, will not render the patent in-

**PATENT — VALIDITY — continued.**

valid. [McLEAN and DANIEL, JJ., dissenting.] *Gayler v. Wilder*, 10 How. 477.

6. Previous discovery in a foreign country will not avoid a patent, unless such discovery, or some substantial part of it, has been patented, or described in a printed publication. *O'Reilly v. Morse*, 15 How. 62.

7. An American patent is not invalid because on its face it does not run for the same time as a prior foreign patent taken by the patentee for the same invention. *Ib.* See *Smith v. Ely*, 15 How. 137.

8. If a second patent be issued for the same invention on a prior claim, the second one, and not the first one, will be void. *Suffolk Manufacturing Co. v. Hayden*, 3 Wal. 315.

9. Whether or not the patent is valid is not material on a claim by one joint owner on the other for an account of profits, as the invalidity of the patent would not invalidate sales of the patented article. *Kinsman v. Parkhurst*, 18 How. 289.

**PATENT FOR LANDS — In general.**

See LANDS.

**PAYMASTER — Army — Pay of.**

See ARMY, 6.

*Liability on Official Bond.*

See BOND, 28.

**PAYMENT — In general — What constitutes Payment — Demand — Designation of Place of Payment.**

See pl. 1-11.

*Presumption and Proof of Payment.*

See pl. 12-21.

*Acceptance of Note, etc., as Payment.*

See pl. 22-27.

*Application of Payments — How made — Who may make.*

See pl. 28-34.

*Conditional Payment.*

See pl. 35.

**1. — What constitutes Payment — What, a Demand — Designation of Place of Payment.**

If a negotiable note received as a conditional payment has been passed to and is owned by a third person, the creditor cannot sue on the original contract. *Harris v. Johnston*, 3 Cranch, 311.

2. Receipt of the individual note of one of two joint debtors in payment extinguishes the debt. *Sheehy v. Mandeville*, 6 Cranch, 253.

3. If one exchanges certificates of indebtedness for an equal amount of negotiable securities, which he sells for their value in the market, he cannot assert against the debtor a claim based on the original debt. *Looney v. District of Columbia*, 113 U. S. 258.

4. An agreement to pay "in the paper" of a certain company "or its equivalent" is satisfied

**PAYMENT — continued.**

by a tender of the paper of that company; the promisee can recover in specie only its market, not its nominal, value. *Robinson v. Noble*, 8 Pet. 181.

5. Where a note, deposited in bank for collection by its owner, is paid by one not a party thereto, with the intention of having it remain as an existing security, and the money so paid is received by the owner of the note, — such person thereby becomes the purchaser of the note, and its negotiability remains after as before maturity, subject to the equities between the parties. *Dodge v. Freedman's Savings & Trust Co.*, 93 U. S. 379.

6. Where the maker of a note secured by mortgage, being unable to pay it, applies to A. to advance the money and take up the note, and A. pays to the payee what money he has and tells the payee that a certain bank will pay the rest, whereupon the payee delivers up the note to A. uncanceled and indorsed in blank, and gets the rest of the money from the bank, to which A. has delivered the note, and in a few days A. repays to the bank the amount advanced and takes the note, the payee cannot contend that he understood the note to have been cancelled. *Carter v. Burr*, 113 U. S. 737.

7. If the drawee of a bill, for the purpose of relieving the accommodation acceptor, agree with the indorsee to satisfy it, and afterwards do satisfy it while it is held by a bank to which the indorsee has transferred it as collateral security, and the indorsee subsequently acquire title thereto from the bank, it will be thereby extinguished so that the bank cannot enforce it against the acceptor, notwithstanding failure of the indorsee to perform the contract by which he reacquired title. *Farmers' Bank v. Groves*, 12 How. 51.

8. After the breaking out of the war, a debtor in a rebel state could not, by there paying in confederate currency the amount of the debt to an agent of a creditor resident in a loyal state, absolve himself from his obligation. *Fretz v. Stover*, 22 Wal. 198.

9. Although bailees or trustees in the insurgent states may in some cases be relieved from liability to their bailors or *cestuis que trust*, citizens of loyal states, where the property was forcibly taken from them under confederate authority, a debtor is not relieved by a forced payment under such authority. *Williams v. Bruffy*, 96 U. S. 176; *Stevens v. Griffith*, 111 U. S. 48.

10. A draft drawn by a creditor on his debtor is equivalent to a demand for payment. *Cooper v. Coates*, 21 Wal. 105.

11. The designation of a bank as the place of payment of a bond imports a stipulation that its holder will have it at the bank, when due, to receive payment, and that the obligor will have the funds there to pay it. *Ward v. Smith*, 7 Wal. 447.

12. — *Presumption and Proof of Payment.* Presumption of payment arising from lapse of

**PAYMENT** — *continued.*

time may be repelled. *Higginson v. Mein*, 4 Cranch, 415.

13. No presumption of payment of a bond given by a deputy postmaster to the postmaster-general arises from the lapse of a little more than five years. *Dox v. Postmaster-General*, 1 Pet. 318.

14. Presumption of payment of a bond will not arise until after the lapse of twenty years, exclusive of the period of the plaintiff's disability. *Dunlop v. Ball*, 2 Cranch, 180.

15. Lapse of time will raise a presumption that the mortgagor in possession has paid the mortgage debt. But that presumption may be rebutted by proof of payments on the debt; and purchasers under the mortgagor with constructive notice of the mortgage will be affected by his act of payment. *Hughes v. Edwards*, 9 Wheat. 489.

16. Where one, discharged for his own fault from service as agent for an insurance company, seeks to recover from the company a percentage of renewal premiums to which, under his contract, he is entitled on payment of the premiums to the company, he cannot prevail on proof merely that there were policies on which premiums became due before suit brought. No presumption follows from this that payment has been made. *Manning v. John Hancock Mutual Life Insurance Co.*, 100 U. S. 693.

17. A claim against an estate for money lent is properly rejected where no demand was made of the decedent in his lifetime nor against his executors until more than thirty years from the date of the alleged loan. *Rogers v. Law*, 1 Black, 253.

18. Under plea of payment to debt on bond, evidence is admissible that the obligor delivered wheat to the plaintiff at a fixed price, on account of the bond, and assigned to him certain claims, part of which he collected, and part of which he negligently lost. *Buddicum v. Kirk*, 3 Cranch, 293.

19. An acknowledgment that payment of a less sum than that secured by a bond is in full satisfaction of all claims, is evidence that only that balance remained due, and therefore warrants a finding that the full sum had been paid. *Henderson v. Moore*, 5 Cranch, 11.

20. Parol evidence of a payment may be admissible, although written evidence thereof be in existence. It was accordingly held, in the circumstances, that the plaintiff might so prove payment, although the defendant had made an entry thereof in the plaintiff's cash-book. *Keene v. Meade*, 3 Pet. 1.

21. The fact that an executor, in his accounts as settled in the probate court, has charged himself with the amount of a certain note, and that distribution of the estate has been made accordingly, is not conclusive, in an action by an administrator with the will annexed against the maker of the note, on the question of whether, in

**PAYMENT** — *continued.*

fact, it has been paid. *Butterfield v. Smith*, 101 U. S. 570.

22. — *Acceptance of Note, etc., as Payment.* By the commercial law, the taking of a note does not extinguish the debt for which it is given, but merely extends the credit until the date of its maturity. *The Kimball*, 3 Wal. 37.

23. And in Massachusetts, although it raises a presumption of extinguishment, that presumption may be repelled by evidence of a contrary intention. *Ib.*

24. The taking of a note or bill for an antecedent debt will not operate as payment, unless such is the express agreement. *The Bird of Paradise*, 5 Wal. 545.

25. The acceptance of a negotiable note for an antecedent debt does not extinguish it, unless it be agreed that the note shall operate as payment. *Peter v. Beverly*, 10 Pet. 332; *Lyman v. United States Bank*, 12 How. 225. See *United States Bank v. Daniel*, 12 Pet. 32; *United States Bank v. Beverly*, 1 How. 134.

26. Delivery and receipt of a certificate of deposit in a bank which does not pay specie, payable on a future day, held not payment in the absence of an agreement to that effect. *Downey v. Hicks*, 14 How. 240.

27. Where one makes advances to the master of a vessel in a foreign port, the receipt of a draft on the owner is in law presumed, as in the ordinary case of the receipt of a mere promise to pay, to be intended as a conditional payment only, not as a satisfaction of the sum advanced. *The Emily Souder*, 17 Wal. 666.

28. — *Application of Payments — How made — Who may make.* If the debtor do not elect to make a particular application of a payment, when the payment is made, the creditor may, at any time afterwards, elect to what debt to apply it. *Alexandria v. Patten*, 4 Cranch, 317.

29. If neither the debtor nor the creditor make application of a payment, the court may make it, and, it being equitable that the entire debt should be paid, may so make it as first to extinguish that part for which the security is most precarious. *Field v. Holland*, 6 Cranch, 8. See *Backhouse v. Patton*, 5 Pet. 160.

30. The privilege of the creditor to make an application of his payments ends with the beginning of controversy. The law then makes the application. *United States v. Kirkpatrick*, 9 Wheat. 720.

31. The debtor need not expressly direct the application of a payment to a particular demand, to make it applicable thereto in law. His election, as well as the assent of the creditor, may be manifested by circumstances. *Tayloe v. Sandiford*, 7 Wheat. 13.

32. A refusal to pay one debt and an acknowledgment of another, with delivery of the sum due thereon, would be sufficient evidence of an election. *Ib.*

**PAYMENT** — *continued.*

33. If a collector of revenue give two bonds for different terms with different sureties, a promise by the supervisor to apply payments for collections made after the giving of the second bond exclusively to the discharge of the first bond, does not amount to an application of such payments, and is not binding on the government. *United States v. January*, 7 Cranch, 572.

34. If a postmaster, being in default, afterwards make payments without directing an application thereof, the government may apply them to the extinguishment of the previous balance, throwing the deficit into a subsequent quarter, and thus depriving his sureties of any defence they otherwise might have had under the act of March 3, 1825 (4 Sts. 103), limiting their liability. *Jones v. United States*, 7 How. 681.

35. — *Conditional Payment.*] A creditor who receives the notes of a third person as conditional payment is bound to use due diligence in collecting them; laches therein will render the payment absolute. *Douglass v. Reynolds*, 7 Pet. 113.

*Advance Payments by Government.*

See UNITED STATES — LIABILITY, 25, 26.

*Agent of Insurance Company to accept Payment of Premiums — Power of.*

See INSURANCE — COMPANY, 10, 12.

*Agreement to accept Specific Articles — Valid — Imports Valuable Consideration.*

See ACCORD AND SATISFACTION, 1, 2.

*Application — Instructions.*

See BANKRUPTCY — PROCEEDINGS TO CONVERT ESTATE, 41.

*Assignee of Certificate of Indebtedness — Effect of Payment to.*

See ASSIGNMENT, 28.

*Bankruptcy — Fraudulent Preference.*

See BANKRUPTCY — PRIOR TRANSACTIONS, 29 *et seq.*

*Contract to pay — What is, as distinguished from a Contract for Indemnity.*

See CONTRACT — CONSTRUCTION, 40.

*Coupons — Extinguishment.*

See SUBROGATION, 1.

*Debts due from United States — To which Administrator paid.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 17.

*Executor out of the Jurisdiction — Payment to, will discharge the Debt.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 14-16.

*Failure to pay — When a Breach of Contract justifying its Abandonment.*

See CONTRACT — PERFORMANCE AND BREACH, 4.

*Forged Paper — Effect of Payment in.*

See BANK, 24.

**PAYMENT** — *continued.**Gold — When Contract to pay in Gold is implied.*

See CONTRACT — WHAT CONSTITUTES, 13.

*In Hand — Sight Draft equivalent to.*

See PLEADING — VARIANCE, 9.

*Mortgage Debt — What amounts to Payment — Effect.*

See MORTGAGE — PAYMENT.

*Mortgage — What constitutes Payment.*

See RAILROAD — MORTGAGE, 38.

*Part Payment affecting Statute of Limitations — Interest.*

See LIMITATION — EXCEPTIONS AND INTERRUPTIONS, 81, 82.

*Presumption therefrom of Resulting Trust.*

See TRUST — CREATION AND CONSTRUCTION, 33.

*Priority — Right of United States.*

See UNITED STATES — PRIORITY OF PAYMENT.

*Priority — When not lost by taking other Security.*

See BANK, 13.

*Receipt, a Waiver of Right to Agreed Damages under Bond.*

See SETTLEMENT, 1.

*Suspension of Commercial Intercourse by War.*

See TRADING WITH ENEMY.

*Treasury Notes — What constitutes Payment by Government.*

See GOVERNMENT BONDS, 3.

*Voluntary — Effect of, as precluding Recovery.*

See ASSUMPSIT, 26, 29.

*Voluntary Payment of another's Debt — Effect.*

See ASSUMPSIT, 9.

*Voluntary — Payment of Tax within Period allowed for Redemption after Tax Sale.*

See TAX — COLLECTION, 63, 64.

**PEACE** — *Justice of the — In general.*

See JUSTICE OF THE PEACE.

**PEDDLERS** — *Commercial Travellers — Regulation of Sales.*

See COMMERCE; TAX — POWER, 14 *et seq.*

**PEDIGREE** — *Proof by Hearsay.*

See EVIDENCE — HEARSAY, 14.

**PENALTY** — *Breach of Contract — What constitutes an Agreement for Penalty.*

See CONTRACT — CONSTRUCTION, 22.

*Breach of Customs Laws.*

See DUTIES — PENALTIES AND FORFEITURES.

*Breach of Internal Revenue Laws, in general.*

See INTERNAL REVENUE — PENALTIES AND FORFEITURES.

**PENALTY** — *continued.*

*Crime — Penalties therefor — In general.*

See **CRIME**.

*Damages by Way of — In general.*

See **DAMAGES**.

*Forfeiture — In general.*

See **FORFEITURE**.

*Gross Sum agreed to be paid for Non-performance of Contract, when deemed Penalty.*

See **DAMAGES**, 43.

*Harboring Fugitive Slave — Action to recover — Pleading.*

See **SLAVERY**, 35 *et seq.*

*Statutes giving Half Pilotage not penal.*

See **ADMIRALTY — JURISDICTION**, 62.

**PENNSYLVANIA** — *Lands of the State.*

See **LANDS OF STATES — PENNSYLVANIA**.

**PENSION** — *In General — Under Various Statutes.* No pensioner has a vested right to his pension. It is a matter of bounty. Where, therefore, a statute denies the right to two pensions, one under a special law and another under a general law, a pensioner cannot claim both because, before the passage of such statute, both were paid him. *United States v. Teller*, 107 U. S. 64.

2. The word "children" in the act of June 4, 1832 (4 Sts. 529), granting revolutionary pensions, includes grandchildren, and they take, *per stirpes*, the share of their deceased parent, whether the parent died before or after the death of the pensioner. [DANIEL, CURTIS, and CAMPBELL, JJ., dissenting.] *Walton v. Cotton*, 19 How. 355.

3. Under the act of February 3, 1853 (10 Sts. 154), granting to widows of revolutionary soldiers who were married after January, 1800, "a pension in the same manner as those who were married before that date," the pension accrues only from the date of the act, not from that of the prior act giving a pension to widows married before 1800. Such was the construction acted on by the commissioner of pensions, and favored by subsequent acts on the same general subject. *United States v. Alexander*, 12 Wal. 177.

4. Section 13 of the act of July 4, 1864 (13 Sts. 339), prescribing a punishment for those withholding "from a pensioner or other claimant the whole or any part of the pension or claim allowed," does not apply to one withholding arrearages of pay and bounty from those for whom they have been collected. The word "claimant" must be limited, from its connection, to mean a pension claimant. *United States v. Benecke*, 98 U. S. 447.

5. The power proposed to be conferred on the circuit courts by the act of March 23, 1792 (1 Sts. 243), relative to the ascertainment of rights to pensions, was not judicial power within the meaning of the constitution, and could not, therefore, lawfully be exercised by the courts. *United States v. Todd*, 13 How. 52.

**PENSION** — *continued.*

6. But as the intent of the act was to confer that power on the courts as a judicial function, it cannot be construed to confer authority on the judges to act as commissioners. *Ib.*

*Bounties — In General.*

See **BOUNTY**.

*Commissioner not Head of a Department.*

See **EXECUTIVE DEPARTMENTS**, 7.

*Congress has Power to punish Conversion by Guardian of Pensioner.*

See **CONGRESS**, 14.

*Withholding not a Continuing Offence.*

See **LIMITATIONS — STATUTES**, 66.

**PEORIA** — *Public Lands — Confirmation of Claims.*

See **LANDS OF UNITED STATES — LEGISLATIVE GRANTS**, 107.

*Public Lands — Settlement Rights — Conflicting Claims.*

See **LANDS OF UNITED STATES — CONFLICTING CLAIMS**, 4 *et seq.*

**PERFORMANCE** — *Agreements within the Statute of Frauds.*

See **FRAUDS**, **STATUTE OF**.

*Contract — In general.*

See **CONTRACT — PERFORMANCE AND BREACH**.

*Failure to perform — Ground for avoiding Contract.*

See **CONTRACT — RESCISSION, WAIVER, ETC.**, 4.

*Specific — In general.*

See **SPECIFIC PERFORMANCE**.

**PERILS OF THE SEA** — *Carrier — Perils, etc., as affecting Liability.*

See **CARRIER — DUTY AND LIABILITY**.

*Insurance — Perils, etc., as affecting.*

See **INSURANCE — MARINE**.

**PERJURY** — *What constitutes — Averment — Proof.*

The act of March 1, 1823 (3 Sts. 771), for the punishment of false swearing in support of a claim against the government, extends to the case of a false affidavit taken before a state magistrate authorized by the state to administer oaths, in pursuance of a regulation or in conformity with a usage of the treasury department, under which such affidavit would be admissible in support of a claim against the government, although the magistrate had no express authority from the government to administer an oath in such a case. [MCLEAN, J., dissenting.] *United States v. Bailey*, 9 Pet. 238.

2. Perjury in the taking of the owners' oath prescribed by section 4 of that act, may be proved by the defendant's letters and other documents recognized by him as genuine, without produc-



**PERJURY** — *continued.*

tion of a living witness to testify to the falsity of the oath taken. [THOMPSON, J., dissenting.] *United States v. Wood*, 14 Pet. 430.

3. An indictment for perjury need not refer to the statute requiring the oath, but need only aver the facts constituting the occasion for taking it, as the court will take notice of the statute. *United States v. Nickerson*, 17 How. 204.

4. Under Rev. Sts. § 5392, which declares that one who, having taken an oath that any written declaration or certificate by him subscribed as true, wilfully and contrary thereto states or subscribes any material matter which he does not believe to be true, is guilty of perjury, the clerk of a circuit court may be indicted for swearing falsely to his emolument returns and account of services rendered, the words "declaration" and "certificate" in the statute being used in their ordinary, and not in any technical, sense, and applying to any sworn and subscribed statement of material matters of fact. *United States v. Ambrose*, 108 U. S. 336.

**PERPETUATION** — *Evidence — In general.*

See DEPOSITION.

**PERPETUITY** — *Rule against — In general — When applicable.*

See DEVISE AND LEGACY.

*Rule against, not applicable to Devise to Charity.*

See CHARITY, 25, 26.

*What creates — Devise to Trustees to convey to Corporation not yet created.*

See CHARITY, 14.

**PERSON** — *When Corporation is a Person.*

See ABANDONED AND CAPTURED PROPERTY, 11; UNITED STATES — PRIORITY OF PAYMENT, 22.

*Damages for Injuries to — In general.*

See DAMAGES, 27 *et seq.*

*Disability of — Pleas to.*

See PLEADING — DILATORY PLEAS.

*Meaning of Word — United States not.*

See DEVISE AND LEGACY, 76.

**PERSONAL INJURIES** — *Damages therefor — In general.*

See DAMAGES, 27 *et seq.*

*Negligence causing — Action for.*

See NEGLIGENCE.

*Servants — Injuries to and by.*

See MASTER AND SERVANT.

**PERSONALTY** — *Damages in Actions relating thereto — In general.*

See DAMAGES.

*Descent and Distribution thereof — In general.*

See DESCENT.

**PERSONALTY** — *continued.*

*Married Woman — In general.*

See HUSBAND AND WIFE.

*Mortgages of — In general.*

See CHATTEL MORTGAGE.

**PHRASES** — *Meaning of — In general.*

See VARIOUS PHRASES IN THEIR ORDER.

**PILOT** — *Power of States to enact Laws for regulating Pilots and Pilotage — Construction of Act of 1852 — When Pilot entitled to Fees — Effect of Repeal of Statute.* A regulation of pilots and pilotage is a regulation of commerce within the meaning of the constitution. *Cooley v. Philadelphia Port Wardens*, 12 How. 299.

2. But the mere grant to congress of the power to regulate commerce does not prevent the states from regulating pilots, that being a subject requiring diversity, with a view to the local needs of navigation. [McLEAN, J., dissenting.] *Id.*

3. State statutes regulating pilotage are, in view of their recognition and adoption by congress, to be regarded as constitutional until congress supersedes them. *Id.*; *Pacific Mail Steamship Co. v. Joliffe*, 2 Wal. 450; *Ex parte McNiel*, 13 Wal. 236; *Wilson v. McNamee*, 102 U. S. 572.

4. A law regulating pilots and pilotage is not a law laying imposts or duties, within the meaning of the constitution, if it do not pass the limits of that subject, which it cannot be deemed to do, because it requires the payment of half pilotage fees by certain vessels which decline to receive a pilot, and not by others, nor because it gives the funds so obtained to a charitable fund for distressed pilots, their widows and children. *Cooley v. Philadelphia Port Wardens*, 12 How. 299.

5. The act of August 30, 1852 (10 Sts. 61), regulating the management of steam vessels, does not establish pilot regulations for ports, its object concerning pilots being merely to compel the employment of competent ones on the voyage. [WAYNE, CLIFFORD, and MILLER, JJ., dissenting.] *Pacific Mail Steamship Co. v. Joliffe*, 2 Wal. 450.

6. A pilot may recover pilotage under a state pilot law, although the service was tendered and refused at a point outside state jurisdiction. *Wilson v. McNamee*, 102 U. S. 572.

7. Where a right of action has arisen on a contract, or a transaction in the nature of a contract, authorized by statute (*e. g.*, a right to half-pilotage fees allowed to a pilot on refusal of employment by a vessel coming into port), and has been so far perfected that nothing remains to be done by him asserting it, a repeal of the statute does not affect it or a suit pending to enforce it. [WAYNE, CLIFFORD, and MILLER, JJ., dissenting.] *Pacific Mail Steamship Co. v. Joliffe*, 2 Wal. 450.

*Duty of Boats as to carrying Lights.*

See COLLISION, 36.

**PILOT** — *continued.*

*Negligence of, as affecting Liability of Owner of Vessel.*

See COLLISION, 6, 20-22, 141, 145.

*Pilotage — Jurisdiction of Suits for Pilotage Services — Half Pilotage.*

See ADMIRALTY — JURISDICTION, 61, 62.

*Regulation of Pilotage.*

See COMMERCE, 9.

*Salvage — Pilot acting in Line of Duty not entitled to.*

See SALVAGE, 8, 9.

**PIRACY** — *What constitutes — Piratical Aggression — Effect — What Commission protects the Aggressor — Statutes — Constitutionality — Repeal.*

See pl. 1-14.

*Jurisdiction of Federal Courts — Pleading — Evidence.*

See pl. 15-22.

1. — *What constitutes — Piratical Aggression — Effect — What Commission protects the Aggressor — Statutes — Constitutionality — Repeal.* Robbery on the sea is piracy by the law of nations. *United States v. Smith*, 5 Wheat. 153; *United States v. Furlong*, Id. 184.

2. Where it is committed on a foreign vessel by one not a citizen of the United States, it is not piracy under the act of April 30, 1790 (1 Sts. 113). *United States v. Palmer*, 3 Wheat. 610.

3. It may be piracy within that act, although if committed on land it would not be punishable with death. *Ib.*

4. The term *robbery* in that act means the offence so defined at common law. *Ib.*

5. That act extends to any person on any vessel acknowledging the authority of no acknowledged power, cruising piratically and committing piracy on other vessels. *United States v. Klintock*, 5 Wheat. 144.

6. As the assumption of piratical character by a vessel involves the loss of her national character, a piracy committed by a foreigner from on board such vessel, on any other vessel, is punishable under that act. *United States v. Furlong*, 5 Wheat. 184.

7. An attack on an American ship by an armed vessel, made under a mistaken supposition that she was a pirate, without any felonious intent, is not a piratical aggression within the meaning of that act. *The Marianna Flora*, 11 Wheat. 1.

8. Under the act of March 3, 1819 (3 Sts. 510), a foreign vessel may be seized and sent in for adjudication for an act of piratical aggression on the high seas. *Ib.*

9. Any piratical aggression subjects the vessel to forfeiture under that act, although not made *causa lucri*; and it will make no difference that the owner was entirely innocent, and that the vessel was armed for a lawful purpose and started

**PIRACY** — *continued.*

for a lawful voyage. *United States v. The Malek Adhel*, 2 How. 210.

10. But the cargo of the innocent owner is not subject to forfeiture under that act, nor under the law of nations construed in the light of the policy indicated by that act. *Ib.*

11. A commission from an unacknowledged government, held, in the circumstances, no protection to the captor on a charge of piracy, the capture being made not *jure belli*, but *animo furandi*. *United States v. Klintock*, 5 Wheat. 144.

12. A commission from a belligerent of a friendly power will not protect a citizen of the United States who fits out a vessel in a home port to cruise against that power from punishment for an offence against a vessel of the United States. *United States v. Furlong*, 5 Wheat. 184.

13. Section 5 of the act of 1819 is not an unconstitutional exercise of the power conferred on congress by the constitution, to define and punish piracy, by reason of its defining that crime by referring to the law of nations. *United States v. Smith*, 5 Wheat. 153; *United States v. Furlong*, Id. 184.

14. Section 8 of the act of 1790, for the punishment of piracy, was not repealed by the act of 1819. *United States v. Furlong*, 5 Wheat. 184.

15. — *Jurisdiction of Federal Courts — Pleading — Evidence.* The federal courts have no jurisdiction to try an indictment for piracy, for robbery committed on the high seas on a foreign vessel by one not a citizen of the United States. *United States v. Palmer*, 3 Wheat. 610.

16. Under the act of 1790 they have jurisdiction of robbery or murder committed on the high seas on a vessel not belonging to citizens of the United States, if the vessel had no national character or were held by pirates; and it makes no difference that the offence was committed by one not a citizen of the United States. *United States v. Holmes*, 5 Wheat. 412.

17. So they have where the offence was consummated not on any vessel, but in the sea, as by throwing one overboard and drowning him, or by shooting him in the sea, although he was not thrown overboard. *Ib.*

18. The words "out of the jurisdiction of any particular state," in the act of 1790, mean out of the jurisdiction of any particular state of the Union. *United States v. Furlong*, 5 Wheat. 184.

19. In an indictment for a piratical murder, under section 8 of the act of 1790, it is unnecessary to allege that the respondent was a citizen of the United States, or that the crime was committed on board a vessel belonging to citizens of the United States. It is sufficient to charge its commission from on board such a vessel, by a mariner sailing thereon. *Ib.*

20. In a proceeding *in rem* under the acts of 1819 and May 15, 1820 (3 Sts. 600), for a piratical aggression, it is unnecessary to allege or prove

**PIRACY — continued.**

a previous conviction of the person. *The Palmyra*, 12 Wheat. 1.

21. On an indictment for piracy, it is competent for the jury to find that a vessel at anchor in an open roadstead within a marine league of the shore is on the high sea. *United States v. Furlong*, 5 Wheat. 184.

22. On an indictment for piracy, the jury may find the national character of a vessel, on satisfactory evidence, without production of the certificate of registry or other documents, and without proof of their having been on board. *Ib.*

*Costs in Proceeding for Piratical Aggression.*  
See COSTS, 8.

*Probable Cause a Bar to Damages for a Seizure for a Piratical Aggression.*  
See INTERNATIONAL LAW, 16.

**PLEADING — Aider by Verdict.**

See PLEADING — AIDER BY VERDICT.

*Codes — Pleading under.*

See PLEADING UNDER CODES.

*Declaration — In general.*

See PLEADING — DECLARATION.

*Demurrer in Pleading at Law.*

See PLEADING — DEMURRER.

*Dilatory Pleas — Pleas in Abatement.*

See PLEADING — DILATORY PLEAS.

*Equity — Pleading in, in general.*

See EQUITY PLEADING.

*General Rules in Pleading at Law.*

See PLEADING — GENERAL RULES.

*Particular Cases — Pleading in, in general.*

See PLEADING — PARTICULAR CASES.

*Particular Courts — Pleading in, in general.*

See PLEADING — PARTICULAR COURTS.

*Pleas to Merits in Pleading at Law.*

See PLEADING — PLEA TO MERITS.

*Practice in Pleading at Law.*

See PLEADING — PRACTICE IN PLEADING.

*Replication in Pleading at Law.*

See PLEADING — REPLICATION.

*Variance — In general.*

See PLEADING — VARIANCE.

**PLEADING — AIDER BY VERDICT — Defective Statement cured — Not Defective Cause — Aider by Finding of Court.]** A verdict cures a defective statement of a title or cause of action. *Lincoln v. Cambria Iron Co.*, 103 U. S. 412.

2. Defective allegation of a good cause of action is cured by verdict, it being presumed that facts necessary to a recovery were proved. *Renner v. Columbia Bank*, 9 Wheat. 581; *Pearson v. Metropolis Bank*, 1 Pet. 89. See *De Sobry v. Nicholson*, 3 Wal. 420.

3. But it is otherwise in case of the statement of a defective cause. *McDonald v. Hobson*, 7

**PLEADING — AIDER BY VERDICT — continued.**  
How. 745. See *De Sobry v. Nicholson*, 3 Wal. 420.

4. Allegation of a misnomer of one of the plaintiffs cannot avail after judgment. *Breedlove v. Nicolet*, 7 Pet. 413.

5. It cannot be presumed in aid of the verdict that a fact necessary to a recovery was proved, when the record shows affirmatively that no proof of it was introduced. *Washington v. Ogden*, 1 Black, 450.

6. The defect of debt in the debit for foreign money is cured by a verdict finding the value of the money. *Brown v. Barry*, 3 Dal. 365.

7. If the jury find specially the value of foreign money, the want of an averment of the value in the declaration is cured. *Ib.*

8. A general averment of readiness to perform an agreement to take a lease is good after verdict. *Carroll v. Peake*, 1 Pet. 18.

9. Where an assignor of a promissory note agrees to be liable only in case of an ineffectual suit by the assignee, unless suit would be unavailing, the non-averment in an action against the assignor of any special fact or reason why such suit would have been unavailing, although it renders the declaration bad on demurrer, is a defect which is cured by verdict. *Wills v. Claffin*, 92 U. S. 135.

10. In an action on a bond, a replication to a plea of general performance should assign a special breach, but an omission of such assignment is cured by verdict. *Minor v. Mechanics Bank*, 1 Pet. 46.

11. Refusal to charge the jury on a relevant point of law is erroneous, but the error is cured by a verdict in conformity with a proper charge. *Douglass v. McAllister*, 3 Cranch, 298.

12. Want of an averment of damage in a count in assumpsit is cured by a verdict. *Metropolis Bank v. Gutschlick*, 14 Pet. 19.

13. Want of averment of time in the declaration is cured by a verdict. *Stockton v. Bishop*, 4 How. 155.

14. What allegation of partnership between the plaintiffs will be sufficient after a general verdict. *Murphy v. Stewart*, 2 How. 263.

15. An objection to the technical sufficiency of a replication to put in issue the material averments of the plea cannot be raised after verdict. *Erskine v. Hohnbach*, 14 Wal. 613.

16. If proof of letters of administration be necessary under the local law, the want of it is cured by a verdict. *Murphy v. Stewart*, 2 How. 263.

17. If the special count in a declaration on a note be wanting in an averment of the citizenship necessary to the jurisdiction, but the declaration also contain the common money counts for a sum equal to the amount of the judgment, it will be presumed after verdict, the record being silent, that evidence of citizenship was introduced under the common counts. *United States Bank v. Moss*, 6 How. 31.

**PLEADING—AIDED BY VERDICT—continued.**

18. Where a plea is erroneously overruled on demurrer, the judgment will not be disturbed after verdict, if issue be joined on another plea under which the same defence might be made. *Junction Railroad Co. v. Ashland Bank*, 12 Wal. 226.

19. When a case is tried, and a verdict rendered as if the pleadings were perfect, the failure to demur, or to reply to a special plea setting up matter of defence, furnishes no ground for reversing the judgment. *Nauvoo v. Ritter*, 97 U. S. 389.

20. A pleading which would be cured by verdict is good after a finding by the court to which the trial of the issue is submitted by stipulation of parties. *Adam v. Norris*, 103 U. S. 591.

**PLEADING—DECLARATION—Averments necessary or sufficient.**

See pl. 1-7.

*Joinder of Counts.*

See pl. 8.

**1. — Averments necessary or sufficient.]**

The declaration must aver every substantive fact necessary to constitute the right of action. *United States Bank v. Smith*, 11 Wheat. 171.

2. A declaration in debt on a decree in chancery for £860 12s. 1d., with interest from a day named to the date of the decree, held bad on error, for that the clause giving interest was omitted. *Thompson v. Jameson*, 1 Cranch, 282.

3. An immaterial averment not descriptive of a written instrument need not be proved. *Wilson v. Codman*, 3 Cranch, 193.

4. Where the damage is special, it must be alleged, or it cannot be proved. *Boyden v. Burke*, 14 How. 575.

5. In a suit on the contract of a municipal corporation, made under a law requiring the consent of a certain number of electors, the plaintiff need not allege that such consent was had, the want of it being matter of defence. *Gelpcke v. Dubuque*, 1 Wal. 221.

6. Where to a covenant in a submission to arbitration are added the words, "as provided in articles of submission this day executed," and there are no such articles, a declaration in an action for breach of the covenant need not notice them, but may leave their non-existence to be proved. *Smith v. Morse*, 9 Wal. 76.

7. A complaint is not defective in not alleging the value of goods, the price of which is sued for, where such value appears definitely when the exhibits, which are made a part of the complaint, are read in connection with it. *Streeper v. Victor Sewing-Machine Co.*, 112 U. S. 676.

8. — *Joinder of Counts.*] A count for money had and received may be joined by consent with counts for deceit for falsely representing that one was a creditor of the government, and thereby obtaining a certificate of stock in the

**PLEADING—DECLARATION—continued.**

public funds. *Fenimore v. United States*, 3 Dal. 357.

**Averments necessary.**

See CORPORATION—SHARES, 38.

**Averments necessary in Action on Coupons of Municipal Bonds.**

See MUNICIPAL BONDS—COUPONS, 6.

**Scire Facias, although a Writ, is in the Nature of a Declaration.**

See SCIRE FACIAS.

**PLEADING—DEMURRER—Form—General or special—What is demurrable.**

See pl. 1-8.

**Effect—What it reaches—What it admits—Form and Effect of Judgment.**

See pl. 9-18.

1. — *Form—General or special—What is demurrable*] Demurrer to a plea of fraud in obtaining a judgment sued on, for that it does not show the particulars of the fraud alleged, must be special. *Christmas v. Russell*, 5 Wal. 290.

2. Conclusion with a verification, instead of to the country, in a plea which tenders an issue, is a defect reached only by special demurrer. *United States v. Girault*, 11 How. 22.

3. Matter of abatement cannot be brought forward by demurrer. *Tyler v. Hand*, 7 How. 573.

4. The non-joinder of proper parties plaintiff can be taken advantage of by demurrer. *Farni v. Tesson*, 1 Black, 309.

5. Where the citizenship averred is not such as will support the jurisdiction, objection that it is not sufficient may be taken by demurrer. A plea in abatement is necessary only where the citizenship averred is otherwise, and the defendant desires to controvert the averment. *Susquehanna & Wyoming Valley Railroad & Coal Co. v. Blatchford*, 11 Wal. 172.

6. Although in general a demurrer calls in question only the sufficiency of the pleading on what appears on its face, if a plea of *non est factum* be required by law to be verified by affidavit, such a plea without an affidavit will be demurrable. *Bell v. Vicksburg*, 23 How. 443.

7. Objection that a plea is not properly entitled, or not duly verified by affidavit, goes to its reception, but is not ground for special demurrer after it is received. *Commercial & Railroad Bank v. Stocomb*, 14 Pet. 60.

8. On *sci. fa.* to revive a judgment, the question of a presumption of a release from lapse of time cannot be raised by a demurrer. *Walden v. Craig*, 14 Pet. 147.

9. — *Effect—What it reaches—What it admits—Form and Effect of Judgment.*] Judgment on demurrer should be for the party who on the whole record appears to be entitled to it. A demurrer reaches the first defect in the pleadings. *United States v. Gurney*, 4 Cranch, 333;

**PLEADING — DEMURRER — continued.**

*United States v. Arthur*, 5 Cranch, 257; *United States v. Linn*, 1 How. 104; *Townsend v. Jemison*, 7 How. 706.

10. The rule that a demurrer reaches back to the first defect does not apply where the defect is merely one of form. *Aurora v. West*, 7 Wal. 82; *Baltimore & Ohio Railroad Co. v. Harris*, 12 Wal. 65.

11. The effect of a demurrer reaches no further back than to the extent of such proceedings as remain *in fieri*. *Dickson v. Wilkinson*, 3 How. 57.

12. A demurrer admits only such facts as are well pleaded. *Commercial Bank v. Buckner*, 20 How. 125.

13. Where the plea denies notice alleged in the declaration, a demurrer to the plea admits notice. *Lexington v. Butler*, 14 Wal. 282.

14. In Colorado, as in general, where the defendant pleads a fact which, if true, precludes a recovery by the plaintiff, the plaintiff, by demurring, admits the truth of the defence set up by the plea. *Sullivan v. Iron Silver Mining Co.*, 109 U. S. 550.

15. Where a demurrer in abatement of the action is overruled, the judgment is final. *Tyler v. Hand*, 7 How. 573.

16. The judgment on a demurrer to several pleas, one of which is good, should be for the defendant. *United States v. Girault*, 11 How. 22.

17. Where a plea in bar of the action is adjudged good on demurrer, the judgment should be *nil capiat*, although there are other issues of fact that are not disposed of, as on the whole it appears that there is no cause of action. *Clearwater v. Meredith*, 1 Wal. 25.

18. That a demurrer to a complaint is sustained, the plaintiff having leave to amend, does not preclude him from renewing, nor the court from entertaining, the same question of law on a fuller development of the facts at the trial on the amended complaint. *Post v. Pearson*, 108 U. S. 418.

**Debt on Judgment — Non-joinder of Judgment Debtors.**

See PLEADING — DILATORY PLEAS, 4.

**Inconsistent Special Pleas — No Demurrer — Motion to strike out.**

See PLEADING — PRACTICE IN PLEADING, 7.

**Replication not denying Plea not confessing and availing.**

See PLEADING — REPLICATION, 4.

**Refusal to compel Joinder as Matter of Error.**

See APPEAL AND ERROR — JURISDICTION, 9.

**Waived by pleading over.**

See PLEADING — GENERAL RULES, 9 *et seq.*

**PLEADING — DILATORY PLEAS — What are — When necessary.**

See pl. 1-6.

**Pleas to Jurisdiction — When proper — Effect — Motion to dismiss.**

See pl. 7-10.

1. — *What are — When necessary.*] A plea that the title to the land which is the subject of the suit was vested in the plaintiff by collusion, to enable him to sue in a federal court, is a plea in abatement. *Spencer v. Lapsley*, 20 How. 264.

2. If one of two partners be sued for a partnership debt, he can avail himself of the non-joinder of his partner only by plea in abatement. *Barry v. Foyles*, 1 Pet. 311.

3. The non-joinder of a defendant in an action *ex contractu* can be taken advantage of only by a plea in abatement. *Metcalf v. Williams*, 104 U. S. 93.

4. To a declaration in debt against one of two judgment debtors alleging the judgment to be joint, and alleging no excuse for the non-joinder of the other debtor, it is not necessary to plead in abatement, the declaration being bad on general demurrer. *Gilman v. Rives*, 10 Pet. 298.

5. Where the plaintiffs sue as husband and wife, if the defendant would dispute the fact of their marriage, he should plead the matter in abatement, not in bar. *Union Packet Co. v. Clough*, 20 Wal. 528.

6. A variance between the writ and the declaration is matter of abatement, and cannot be taken advantage of by general demurrer. *Duall v. Craig*, 2 Wheat. 45.

7. — *Pleas to Jurisdiction — When proper — Effect — Motion to dismiss.*] A question as to the citizenship of a party can be raised by plea in abatement only. *D'Wolf v. Rabaud*, 1 Pet. 476.

8. If the declaration allege the proper citizenship, it can be contested only by plea in abatement. *Wickliffe v. Owings*, 17 How. 47; *Jones v. League*, 18 How. 76.

9. Where a party, pursuant to leave, files a plea to the jurisdiction, his former plea to the merits is thereby withdrawn. *Kern v. Huidekoper*, 103 U. S. 485.

10. A motion to dismiss for want of proper citizenship is too late at the trial, and after pleading to the merits. *De Sobry v. Nicholson*, 3 Wal. 420.

**Abatement — Plea waived by pleading over, etc.**

See PLEADING — GENERAL RULES, 11 *et seq.*; DUTIES — PENALTIES AND FORFEITURES, 54.

**Another Action pending — Plea thereof is a Plea in Abatement.**

See APPEAL AND ERROR — JURISDICTION, 229.

**PLEADING — DILATORY PLEAS — continued.**

*Citizenship necessary to Jurisdiction — Want thereof Matter of Abatement.*

See PLEADING — PLEA TO MERITS, 9.

*Denial of Plaintiff's Corporate Existence must be by Plea in Abatement.*

See CORPORATION — SUITS, 19.

*Effect of Pleading over to a Declaration which states no Cause of Action — Not Waiver.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 261.

*Executor or Administrator — Suits by or against — What Objection taken by Plea in Abatement.*

See EXECUTOR AND ADMINISTRATOR — SUITS, 24 *et seq.*

*Jurisdiction — Want of the Diversity of Citizenship necessary — Plea thereof.*

See CIRCUIT COURT — JURISDICTION, 146.

*Regularity of Seizure for Breach of Revenue Laws can be put in Issue only by Plea in Abatement.*

See DUTIES — PENALTIES AND FORFEITURES, 49.

**PLEADING — GENERAL RULES — Pleading, in General — Construction — Material Averments.**

See pl. 1-3.

*Waiver — Admission — Aider.*

See pl. 9-26.

*Certainty.*

See pl. 27-31.

*Departure — Discontinuance.*

See pl. 32, 33.

1. — *Pleading, in general — Construction — Material Averments*] A pleading bad in part is bad altogether. *United States v. Linn*, 1 How. 104.

2. In general, there can be no averment in pleading against the validity of a record, although there may be against its operation. *Biddle v. Wilkins*, 1 Pet. 687.

3. From the mere fact that in the title to a cause the defendants were described as A. "*et al.*," it cannot be inferred that A.'s partner was a defendant. *Williams v. Bankhead*, 19 Wal. 563.

4. A plea having two intendments should be construed most strongly against the pleader. *United States v. Linn*, 1 How. 104.

5. Thus, a plea by one of several defendants that the bond was materially altered after delivery, without his consent, but not averring that the alteration was made by the plaintiff, or with his privity, is bad on demurrer. [McLEAN, J., dissenting.] *Ib.*

6. A plea to an action on an appeal-bond, given on an appeal to a territorial supreme court, which, while asserting that an appeal to the supreme court of the United States has been taken, fails to aver its pendency or that it has been perfected, is

**PLEADING — GENERAL RULES — continued.**

insufficient, even under a statute which, like the Montana practice act, provides that the allegations of pleading shall be liberally construed with a view to substantial justice. *Gillette v. Bullard*, 20 Wal. 571.

7. An allegation that one has refused to deliver certain articles as he had agreed to do is equivalent to an allegation of a demand and refusal. *Hammond v. Mason & Hamlin Organ Co.*, 92 U. S. 724.

8. For the purposes of pleading, only the ultimate fact to be proven need be stated. Circumstances tending to prove it have no place in the pleadings. *McAllister v. Kuhn*, 96 U. S. 87.

9. — *Waiver — Admission — Aider.*] Pleading over without reservation to a declaration adjudged good on demurrer is a waiver of the demurrer. *Evans v. Gee*, 11 Pet. 80; *Aurora v. West*, 7 Wal. 82; *Watkins v. United States*, 9 Wal. 759; *Campbell v. Wilcox*, 10 Wal. 421; *Stanton v. Embrey*, 93 U. S. 548.

10. So the filing of a replication to an answer after a demurrer thereto has been overruled, is a waiver of the demurrer; and a demurrer so waived is no part of the record. *Young v. Martin*, 8 Wal. 354.

11. Pleading to the merits, and proceeding to trial thereon, is a waiver of all irregularities previously set up by plea in abatement. *Bell v. Mobile & Ohio Railroad Co.*, 4 Wal. 599; *Baltimore & Ohio Railroad Co. v. Harris*, 12 Wal. 65.

12. A waiver, for instance, of an objection to the jurisdiction. *Bailey v. Dozier*, 6 How. 23; *Carter v. Bennett*, 15 How. 354.

13. The pendency of another suit in another jurisdiction cannot be pleaded in abatement after a plea to the merits. *Cook v. Burnley*, 11 Wal. 659.

14. Objection to the maintenance of a suit on a mortgage in a federal court, for that the mortgage was colorably assigned for the purpose of making parties necessary to the jurisdiction, cannot be taken after a plea to the merits, but only in abatement. *Smith v. Kernochen*, 7 How. 198.

15. If the record contain sufficient averments of citizenship to confer jurisdiction, the defendant, if he would impeach the jurisdiction on that ground, must traverse those averments by a proper plea, and support his plea with proof; and if he plead to the merits, he will admit the jurisdiction, although he plead to the jurisdiction at the same time. *Sheppard v. Graves*, 14 How. 505; *Sheppard v. Graves*, Id. 512.

16. Objection on the ground of the illegality of the service of process is waived only where the party pleads to the merits in the first instance, without insisting on it, not by a special appearance to move to set the service aside, nor by answering to the merits after denial of the motion. *Harkness v. Hyde*, 98 U. S. 476.

17. No advantage can be taken of a variance between the account filed for the purpose of obtaining an attachment and the declaration subse-

**PLEADING — GENERAL RULES — continued.**

quently filed, if the defendant have appeared and pleaded to issue. *Barry v. Foyles*, 1 Pet. 311.

18. When, by the withdrawal of a plea, one of the counts is left unanswered, it will not be presumed on error that there was judgment of *nil dicit*, the other pleadings being voluminous and the issues numerous, but it will be deemed rather that the count was waived. *Aurora v. West*, 7 Wal. 82.

19. In Louisiana, a plea of the invalidity of a contract void as against public policy is not waived nor in any way affected by a further plea in reconvention, such a defence being permitted for the sake, not of the defendant, but of the law itself. *Coppell v. Hall*, 7 Wal. 542.

20. If the plaintiff withdraw a replication adjudged bad on demurrer, and file another in its place, he thereby waives the right to question the decision as to the sufficiency of the one withdrawn. *Clearwater v. Meredith*, 1 Wal. 25.

21. A claim in reconvention, made after an exception to the jurisdiction, and on condition that it be overruled, is not a waiver of such exception. *Peale v. Phipps*, 14 How. 368.

22. The omission of the defendant to join in the demurrer to a plea is a waiver of that plea. *Morsell v. Hall*, 13 How. 212.

23. Matter which is not well pleaded, and is no answer to the breach assigned, cannot be considered as an admission of the cause of action. *Simonton v. Winter*, 5 Pet. 141.

24. An averment that the plaintiffs are aliens, not traversed, is confessed. *Breedlove v. Nicolet*, 7 Pet. 413.

25. Defect in a count in debt by reason of a want of claim of damages, if it be a defect, is cured by an *ad damnum* in the writ. *Childress v. Emory*, 8 Wheat. 642.

26. A defect in the declaration may be cured by sufficient averments in the replication, the replication being demurred to. *Baltimore & Ohio Railroad Co. v. Harris*, 12 Wal. 65.

27. — *Certainty*.] Where one justifies an act which is a wrong at common law, on the process, order, or authority of another, he must set forth substantially, and in a traversable form, the process, order, or authority relied on, and not its mere legal effect. *Bean v. Beckwith*, 18 Wal. 510.

28. Thus, the plea of an army officer, sued for an arrest and imprisonment, that the acts complained of were done by order of the president, is defective if it fails to set forth the order; and the rule is not changed by the fact that the defendant intended to rely, by way of justification, on certain statutes designed to protect parties acting under military orders, such statutes not covering all acts, but only those done under orders, proclamations, or authority, which, to be of avail, must be set forth. *Ib.*

29. In a declaration on an agreement for a lease whereby the lessor agreed to remove the former tenant, and to give possession from a cer-

**PLEADING — GENERAL RULES — continued.**

tain day, an averment that the lessor, although specially requested on that day, neglected and refused to turn out the former tenant, who then was or had been in possession, and to deliver possession to the plaintiff, is a sufficient assignment of breach. *Carroll v. Peake*, 1 Pet. 18.

30. An error in the prayer for judgment, in a plea in bar confessed by general demurrer, held not to prevent rendition of the judgment appropriate to the substance of the plea. *Wüthers v. Greene*, 9 How. 213.

31. Where a divorced husband sues his wife's tenant for rent allotted to him by the decree, the tenant, to avail himself of the nullity of the decree, must aver it so that issue may be taken. He cannot set it up on argument under an averment that he "reserves to himself the right to impeach the decree, if occasion should offer and require him to do so." *Cheever v. Wilson*, 9 Wal. 108.

32. — *Departure — Discontinuance*.] A replication which fortifies the declaration is not a departure. Thus, the declaration, which was in debt, under a statute of Virginia, by the assignee of a promissory note, against the maker, alleged that the assignment was for value. The plea alleged that the assignor was declared bankrupt before the assignment. The replication alleged that the assignor took the note as the agent of the assignee and in payment of a debt due to him, and so held it in trust for him. It was held that the allegation that the assignment was for value was immaterial, and that there was no departure. *Wilson v. Codman*, 3 Cranch, 193.

33. Discontinuance as to one count does not affect the rights of the parties under the other counts. *Hughes v. Moore*, 7 Cranch, 176.

**Affecting Judgment.**

See JUDGMENT — RENDITION AND ENTRY.

**Discontinuance — In general.**

See DISCONTINUANCE.

**General Issue on Writ of Right — What amounts to.**

See PLEADING — PLEA TO MERITS, 17.

**Joinder of Counts in Case for Deceit with Counts in Assumpsit for Money had, etc.**

See FRAUD — IN GENERAL, 4.

**Parties — Joint Contract, all Promisees must be joined.**

See CONTRACT — WHAT CONSTITUTES, 21, 22.

**Plea puis darrein Continuance — When proper.**

See MANDAMUS, 94.

**PLEADING — PARTICULAR CASES — Assumpsit — Pleading in.**

See ASSUMPSIT, 31 *et seq.*

**Bills and Notes — Actions on.**

See BILLS AND NOTES — ACTIONS, 12-26.

**Bonds — Actions on — In general.**

See BOND — ACTION, 11-19.

**PLEADING — PARTICULAR CASES — continued.**

*Corporations — Suits by and against.*

See CORPORATION — SUITS, 19-23.

*Covenant — Pleading in.*

See COVENANT — ACTION.

*Creditor's Bill — Complaint equivalent to, treated by Equitable Rules.*

See CREDITOR'S BILL, 7.

*Debt against Sheriff for Escape.*

See SHERIFF, 9.

*Defamation — Actions therefor.*

See LIBEL AND SLANDER, 7 et seq.

*Detinue — Right in Possession, but not in Property.*

See DETINUE.

*Ejectment — In general.*

See EJECTMENT — PLEADING AND PRACTICE.

*Executor or Administrator — Suits by or against.*

See EXECUTOR AND ADMINISTRATOR — SUITS, 24 et seq.

*Fugitive Slave Law — Action for Penalty.*

See SLAVERY, 35 et seq.

*Insurance Policies — Suits thereon.*

See INSURANCE.

*Judgment — Actions on — Allegations necessary.*

See JUDGMENT — ACTION, 2 et seq.

*Libel — Actions therefor.*

See LIBEL AND SLANDER, 7 et seq.

*Limitation — Pleading under Statutes.*

See LIMITATION — PLEADING AND PRACTICE.

*Municipal Bonds — Actions on.*

See MUNICIPAL BONDS — ACTION, 3, 4.

*Partners — Suits against.*

See PARTNERSHIP, 62.

*Patent Suits — Infringement.*

See PATENT — INFRINGEMENT, 91 et seq.

*Penalty for False Registration of Ship — Proceedings therefor.*

See SHIPPING — REGULATION, 2.

*Removal of Causes from State Courts.*

See REMOVAL OF CAUSES.

*Replevin — Plea — Aider by Verdict.*

See REPLEVIN.

*Revenue Cases — Forfeiture for Breach of Revenue Laws.*

See DUTIES — PENALTIES AND FORFEITURES, 49 et seq.

*Revenue Cases — Plea by Collector that Bond of Importer is due and unpaid — Ground for rejecting another Bond.*

See DUTIES — ASSESSMENT, 55.

*Slander — Actions therefor.*

See LIBEL AND SLANDER, 7 et seq.

**PLEADING — PARTICULAR CASES — continued.**

*States — Suits by and against.*

See STATES — SUITS, 21 et seq.

*Trespass against Sheriff for taking Property of Third Person.*

See SHERIFF, 4.

*Trespass de Bonis — True Venue need not be laid.*

See TRESPASS, 3.

*Trover — Pleading in.*

See TROVER.

*Writ of Right — Pleading in general.*

See WRIT OF RIGHT.

**PLEADING — PARTICULAR COURTS — Admiralty — In general.**

See ADMIRALTY — PLEADING; ADMIRALTY — PRACTICE, 26 et seq.

*Bankruptcy — In general.*

See BANKRUPTCY — INITIATORY PROCEEDINGS.

*Claims — Court of — No Special Rules of Pleading — Forms flexible.*

See COURT OF CLAIMS — PRACTICE, 1 et seq.

*Circuit Court — Assignee of Chose in Action suing in Circuit Court bound to aver that Assignor might have sued.*

See CIRCUIT COURT — JURISDICTION, 87.

*Circuit Court — Citizenship when and how averred in Suit in Circuit Court.*

See CIRCUIT COURT — JURISDICTION.

*Criminal — In general.*

See CRIMINAL PROCEDURE; INDICTMENT.

*Equity — Pleading in, in general.*

See EQUITY PLEADING.

*Prize, in general — Parties — Libel.*

See PRIZE — PRACTICE, 2, 3.

*Supreme Court — Averment of Citizenship necessary to give Jurisdiction — Corporation a Party.*

See SUPREME COURT — JURISDICTION, 8.

**PLEADING — PLEA TO MERITS — Pleas in general — Averments necessary and sufficient.**

See pl. 1-7.

*General Issue or Denial and Evidence thereunder.*

See pl. 8-15.

*Special Pleas — Sufficiency.*

See pl. 16, 17.

*Pleas puis darrein Continuance.*

See pl. 18, 19.

**1** — *Pleas in general — Averments necessary and sufficient.*] A plea need answer only the gist of the action. In trespass for taking, detaining, and converting property, therefore, a plea justifying the taking and detaining is good;



**PLEADING — PLEA TO MERITS — continued.**

if the plaintiff rely on the conversion, he must reply by way of new assignment. *Gelston v. Hoyt*, 3 Wheat. 246.

2. A plea which makes a defence good in substance will be sustained on general demurrer, although argumentative in form. *Pendleton County v. Amy*, 13 Wal. 297.

3. Fraud consists in intention, and that intention is a fact which must be averred in a plea of fraud. *Moss v. Riddle*, 5 Cranch, 351.

4. Where the defendant seeks to defend the act with which he is charged, on the authority of a statute, he must plead the facts which bring the case within the statute, not generally that he has complied with its provisions. *Pumpelly v. Green Bay & Mississippi Canal Co.*, 13 Wal. 166.

5. An averment in a declaration that the legislature had no authority to sell and dispose of certain property, is not well denied by a plea that the governor had power to sell and convey it. *Fletcher v. Peck*, 6 Cranch, 87.

6. To an action on the case against a marshal for not levying an execution to enforce a forfeiture, a plea setting out, *in hæc verba*, a warrant from the secretary of the treasury, under the act of March 3, 1797 (1 Sts. 506), remitting the forfeiture, and reciting everything necessary under that act to the assumption of that authority, is a bar: it need not set forth the facts on which the remission was founded. *United States v. Morris*, 10 Wheat. 246.

7. Proof of the allegations of a plea which tenders an immaterial issue does not make out a defence; and to instruct the jury that it does, is error, whatever the system of pleading, although the plea be passed over without a demurrer. *United States v. Dashiell*, 4 Wal. 182.

8. — *General Issue or Denial and Evidence thereunder.*] A variance between the writ and the declaration cannot be taken advantage of under the general issue. The plea puts in issue only the matter of the declaration. *Chirac v. Reinicker*, 11 Wheat. 280; *McKenna v. Fisk*, 1 How. 241.

9. A question as to whether the citizenship of the parties is such that the suit may be maintained in the circuit court cannot be raised under the general issue, the averments of the declaration in respect thereto being sufficient. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Quigley*, 21 How. 202.

10. In Louisiana, a violation by the plaintiff of the contract sued on cannot be proved under a general denial. *Wilcox v. Hunt*, 13 Pet. 378.

11. If the plaintiff avers that which, without an averment, would be presumed, as, for instance, that he is a *bona fide* holder for value of the coupons on which he sues, and his averment is denied, he may support it by evidence. *Macon County v. Shores*, 97 U. S. 272.

12. In an action on a record which shows that no service was made on the defendant, but that

**PLEADING — PLEA TO MERITS — continued.**

an appearance was entered for him by an attorney of the court, it cannot be shown under plea of *nul tiel record*, but only under an appropriate special plea, that the attorney had no authority to appear. *Hill v. Mendenhall*, 21 Wal. 453.

13. If *non assumpsit* be pleaded in an action for a tort, the plea is bad; and if the verdict follow the plea, the defect is not cured by the statute of jeofails, for the plea does not put in issue the substance of the declaration; and judgment on the verdict must be reversed. *Garland v. Davis*, 4 How. 131.

14. Exclusion for irrelevancy of evidence offered in support of a special plea does not prevent its admission under the general issue. *Levy v. Gadsby*, 3 Cranch, 180.

15. Evidence going to the jurisdiction of the court cannot be received under a plea of *non assumpsit*. *Sims v. Hundley*, 6 How. 1.

16. — *Special Pleas — Sufficiency.*] To a declaration in covenant on a charter-party assigning, as a special breach, non-payment of a particular sum earned before a stated time, plea of payment of all sums which became due according to the charter-party was held bad, as tendering no issue. *Simonton v. Winter*, 5 Pet. 141.

17. A plea to a writ of right that neither the demandant nor his ancestor, nor any other under or from whom he derived his title, was ever actually seised or possessed of the demanded premises, or any part thereof, is bad for that it amounts to the general issue. *Liter v. Green*, 2 Wheat. 306.

18. — *Pleas puis darrein Continuance.*] If matter in abatement be pleaded *puis darrein continuance*, the judgment, if against the defendant, is peremptory. *Renner v. Marshall*, 1 Wheat. 215.

19. A plea *puis darrein continuance* is a waiver of all prior pleas. *Wallace v. McConnell*, 13 Pet. 136.

*Former acquittal — What Sufficient Plea.*

See FORMER ACQUITTAL.

*Jurisdiction — Want of Citizenship necessary, Matter of Abatement.*

See PLEADING — DILATORY PLEAS, 7, 8.

*Plea justifying Seizure for a Forfeiture.*

See SEIZURE, 4-6.

*Waives Matter of Abatement.*

See PLEADING — DILATORY PLEAS, 10.

*Withdrawn by Plea to Jurisdiction filed by Permission.*

See PLEADING — DILATORY PLEAS, 9.

**PLEADING — PRACTICE IN PLEADING — Bills of Particulars — Copies annexed — Affidavit.**

See pl. 1-4.

*When a Pleading or a Notice of Special Matter may be stricken out — Repleader.*

See pl. 5-11.

**PLEADING — PRACTICE IN PLEADING — continued.**

*Profert and Oyer — When Profert is necessary — What sufficient — Effect of Oyer — When demandable.*

See pl. 12-16.

*Allowance of Amendment — Matter of Discretion — Effect — New Count — Withdrawal of Plea — Effect.*

See pl. 17-26.

1. — *Bills of Particulars — Copies annexed — Affidavit.* A bill of particulars which apprises the defendant of the amount and substantial ground of the claim is sufficient. *Chesapeake & Ohio Canal Co. v. Knapp*, 9 Pet. 541.

2. Matters of evidence are not required to be stated in a bill of particulars. *Garfield v. Paris*, 96 U. S. 557.

3. In Illinois, where the action is founded on a written instrument, a copy must be filed with the declaration, and constitutes a part of the pleadings. *Nauvoo v. Ritter*, 97 U. S. 389.

4. A statute prohibiting a defendant in an action on a written instrument from denying his signature, except under a plea verified by affidavit, does not apply where he demurs because the instrument is on its face the contract of his principal. *Hitchcock v. Buchanan*, 105 U. S. 416.

5. — *When a Pleading or a Notice of Special Matter may be stricken out — Repleader.* A plea that all the promisees are not joined, filed by leave of court after the trial has begun, may be stricken out by its subsequent order. *Breedlove v. Nicolet*, 7 Pet. 413.

6. A plea in bar which is in substance the same as a plea in abatement already passed on by the jury and found against the defendant, may be stricken out. *Grand Chute v. Winegar*, 15 Wal. 355.

7. Where the averments of one special plea are inconsistent with those of another, the plaintiff may not demur, but should move to strike out one of the pleas, or to compel the defendant to make an election. *Noonan v. Bradley*, 9 Wal. 394.

8. To strike out of an answer that which constitutes a good defence, and on which the defendant may chiefly rely, on motion of the plaintiff, is error. *Mandelbaum v. People*, 8 Wal. 310; *Garnhart v. United States*, 16 Wal. 162.

9. Where an answer held sufficient on demurrer is ordered to be made more specific and certain, it is error to strike out an answer in compliance with the order and render judgment for the plaintiff. *Fuller v. Clafin*, 93 U. S. 14.

10. Where *nil debet* is pleaded, a notice of special matter to be given in evidence may be stricken out, if such evidence is admissible under the plea. *United States v. Stone*, 106 U. S. 525.

11. Where two special pleas set up substantially the same defence, and there is an issue on the merits on one and an immaterial issue on the other, and both issues are found for the plaintiff,

**PLEADING — PRACTICE IN PLEADING — continued.**

to arrest judgment and award a repleader is in effect to allow the same matter to be twice tried, and is therefore a matter in the discretion of the court, and not revisable on error. *Erskine v. Hohnbach*, 14 Wal. 613.

12. — *Profert and Oyer — When Profert is necessary — What sufficient — Effect of Oyer — When demandable.* Profert of a deed is unnecessary if it be stated only as inducement, and the plaintiff be neither party nor privy thereto. *Duvall v. Craig*, 2 Wheat. 45.

13. A general profert of letters testamentary is sufficient. If the defendant would object to their sufficiency, he must crave oyer. *Childress v. Emory*, 8 Wheat. 642.

14. Oyer of a deed of which profert is made in one count does not make the deed a part of the record for the purposes of pleading to the other counts. *Hughes v. Moore*, 7 Cranch, 176.

15. Oyer is not demandable of a record; nor, in an action on a bond for performance of the covenants in another deed, can oyer of that deed be craved; for the defendant, not the plaintiff, must show it, with profert, or an excuse for the omission. *Sneed v. Wister*, 8 Wheat. 690.

16. If oyer be improperly demanded, the defect is aided on general demurrer, but it is fatal on special demurrer for that cause. *Ib.*

17. — *Allowance of Amendment — Matter of Discretion — Effect — New Count — Withdrawal of Plea — Effect.* In general, the allowance or refusal of an amendment is matter of discretion, and not assignable for error. *Marine Insurance Co. v. Hodgson*, 6 Cranch, 206; *Walden v. Craig*, 9 Wheat. 576; *Chirac v. Reinicker*, 11 Wheat. 280; *Wright v. Hollingsworth*, 1 Pet. 165; *United States v. Buford*, 3 Pet. 12.

18. Refusal, for instance, of a motion to amend merely formal defects in the pleadings. *Jenkins v. Banning*, 23 How. 455.

19. Or a refusal to allow a plea in abatement to be filed after pleas to the merits. *Spencer v. Lapsley*, 20 How. 284.

20. Or a refusal of leave to amend, although it rest on an erroneous construction of a written contract. *United States v. Buford*, 3 Pet. 12.

21. Or an allowance of an amendment in proceedings on a writ of error *coram vobis*. *Pickett v. Legerwood*, 7 Pet. 144.

22. Under the judiciary act of 1789, § 32 (1 Sts. 91), as well as on general principles, the court may allow a summons and declaration describing the defendant as administrator to be amended, after a plea in abatement denying that he is administrator and alleging that he is executor, by striking out the words "administrator," etc., and inserting the words "executor," etc., the plea supplying matter by which the amendment may be made. *Randolph v. Barrett*, 16 Pet. 138.

23. Leave to amend, after plea in abatement, disposes of the plea, so that the defendant, hav-

**PLEADING — PRACTICE IN PLEADING — continued.**

ing appeared only for the purpose of so pleading, is out of court; and if he do not appear again, judgment may be rendered against him by default. *Ib.*

24. Where judgment is rendered on a demurrer, an amendment of the defective pleading is a waiver of the judgment. *United States v. Boyd*, 5 How. 29.

25. When a new count is filed, the defendant may plead *de novo*; but if he go to trial on the old plea, and it put the whole declaration in issue, there is no error. *Wright v. Hollingsworth*, 1 Pet. 165.

26. The withdrawal of a plea to the merits by leave of court is not a withdrawal of appearance. *Eltred v. Michigan Insurance Bank*, 17 Wal. 543.

*Mandamus does not lie to compel Inferior Court to allow more than One Plea to be filed.*

See **MANDAMUS**, 55.

*Striking out Pleas as Ground for Reversal.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 461.

*When Evidence in Support of Bad Plea should be left to Jury.*

See **TRIAL — TRIAL BY JURY**, 92.

**PLEADING — REPLICATION — Form — Sufficiency — Replication de Injuria.**] A replication which attempts to submit a question of law to the jury, is bad. *Chapman v. Smith*, 16 How. 114; *Clearwater v. Meredith*, 1 Wal. 25.

2. A replication, for instance, which tenders issue on an allegation that the stock of a railroad company was destroyed and rendered worthless by consolidation with that of another company. *Clearwater v. Meredith*, 1 Wal. 25.

3. A replication which avoids the plea should conclude with a verification. *Wilson v. Codman*, 3 Cranch, 193.

4. A replication which did not deny, but was merely inconsistent with a plea which did not confess and avoid, held bad on demurrer. *United States v. Buford*, 3 Pet. 12.

5. The replication *de injuria* to a plea by a collector of internal revenue justifying the taking of property under a certificate of assessment and an order directing collection puts in issue the material averments of the plea. *Erskine v. Hohnbach*, 14 Wal. 613.

6. And it seems that the replication *de injuria* is a good replication to a plea setting up any matter of justification. *Ib.*

*Averments therein may aid Defective Declaration.*

See **PLEADING — GENERAL RULES**, 26.

*Sufficiency of Replication not open after Verdict.*

See **PLEADING — AIDED BY VERDICT**, 15.

**PLEADING — VARIANCE — What is material — Effect.]**

The proof must conform to the allegations of the pleadings. *Scott v. Lunt*, 7 Pet. 596.

2. If the proof fall short as to numbers, etc., of the things declared for, the plaintiff can recover only according to his proof; but if it exceed, he cannot recover the excess. *Conard v. Nicoll*, 4 Pet. 291.

3. A letter of credit addressed to John and Joseph N. & Co. will not support an action by John and Jeremiah N. & Co. for goods furnished to the bearer on faith thereof. *Grant v. Naylor*, 4 Cranch, 224.

4. There is a fatal variance between a declaration on a note which does not allege when the note is payable, and a note payable at sixty days date. *Sheehy v. Mandeville*, 7 Cranch, 208.

5. If a declaration on a contract erroneously have the name of one party in a context which shows that the other was intended, the variance is not material. *Ferguson v. Harwood*, 7 Cranch, 408.

6. Evidence that a variance between a declaration on a promissory note and the note produced in evidence was the result of mistake or inadvertence on the part of the attorney, and that the note produced was the one intended to be described, is inadmissible. *Sheehy v. Mandeville*, 7 Cranch, 208.

7. Where several defendants unite in a plea of *non est factum*, the issue must be found for the plaintiff, if the instrument appear to be the deed of any one of them. *United States v. Linn*, 1 How. 104.

8. A declaration alleging an injury caused by a fall into an area in a public sidewalk, and charging that the defendant "dug, opened, and made" the area, is supported by proof that he formed it in part by excavation, and in part by raising walls. *Robbins v. Chicago*, 4 Wal. 657.

9. Proof of a sale, and payment by a sight draft, duly paid, will support a declaration on a sale for so much "in hand paid." *Nash v. Towne*, 5 Wal. 689.

10. An averment of a demise for three years, held not supported by proof of a lease for one year, followed by occupation for three years by consent of the landlord. *Alexander v. Harris*, 4 Cranch, 299.

11. There is no variance between a declaration which counts on a bond as a contract made on the first day of the month, and proof of a bond bearing that date but becoming obligatory on the fifteenth. *United States v. Le Baron*, 4 Wal. 642.

12. In an action for an injury to the person, evidence that the plaintiff was largely engaged in business as a manufacturer, and was rendered mentally unable to attend to his business for a long time, is admissible, though the declaration only alleges a general loss through detention from business. *Wade v. Leroy*, 20 How. 34.

13. A judgment of the circuit court for the "eastern district of" a state in which there are

**PLEADING — VARIANCE — continued.**

two districts, an eastern and a western, is inadmissible under a declaration describing a judgment as of the circuit court of "the district" of that state, *nul tiel record* being pleaded. *Dow v. Humbert*, 91 U. S. 394.

14. Where the declaration charges a joint liability, evidence tending to establish a separate liability is inadmissible. *Tilley v. Cook County*, 103 U. S. 155.

15. Proof of a sale of flour at a port on Lake Michigan, in midwinter, the flour being then stored and insured, but sold "free on board steamer" at that port, was held to support a declaration alleging a sale of flour there stored and an agreement to deliver on request, free of charge on board a steamer to be there procured by the sellers after the opening, and a reasonable time before the closing, of spring navigation, the inference being that the flour was to remain until the opening of navigation and to be then shipped. *Nash v. Towne*, 5 Wal. 689.

16. The statute of jeofails reaches a case brought up on error from Louisiana, when there is a variance between the petition and the facts found by the court, the findings being accordant with evidence received without objection. *New Orleans, etc. Railroad Co. v. Lindsay*, 4 Wal. 650.

*Waived by Pleading to Issue.*

See PLEADING — GENERAL RULES, 17.

**PLEADING UNDER CODES — Joinder of Defences — General Denial — General Demurrer — Answer.]** Under the New York Code, § 500, a defendant may embody in his answer both a denial, general or special, and a statement of new matter constituting a defence. He is not limited to one or the other. *Burley v. German-American Bank*, 111 U. S. 216.

2. And a general denial of every allegation, "except as hereinbefore stated or admitted," is sufficient to entitle the defendant to prove anything that will show the untruth of an allegation not admitted. *Ib.*

3. Under the code of Iowa, a general demurrer will not lie to a petition which, on a fair and natural construction, does not show a substantial cause of action. *McFaul v. Ramsey*, 20 How. 523.

4. A general denial in that state of each and every allegation in the plaintiff's petition in an action on a contract does not put in issue the performance by the plaintiff of that which, by the contract, is made a condition precedent to his right to recover, although the petition alleges that the plaintiff has performed all the conditions. *Halferty v. Wilmering*, 112 U. S. 713.

5. Under the civil practice act of Montana, an answer verified upon information and belief is sufficient to present an issue for trial, the facts stated being susceptible of such verification only. *MacLay v. Sands*, 94 U. S. 586.

**PLEADING UNDER CODES — continued.**

6. In Missouri, where the system of pleading allows numerous and inconsistent defences to be interposed in one answer, if such answer states any good defence, a demurrer to the whole answer must be overruled. *Dallas County v. MacKenzie*, 94 U. S. 66.

7. In California, witnesses may be examined in support of an answer which sets up new matter, the statute declaring that such matter shall be deemed controverted. *Cheang-Kee v. United States*, 3 Wal. 320.

8. An amended answer in a redhibitory action for a sale at auction of diseased slaves stating that the auctioneer declared at the defendant's request at the time of sale that the slaves must be examined by the plaintiff's physician before delivery, but that the plaintiff was in such haste to get possession that he removed them without examination, before the act of sale was passed, is not contradictory, within the meaning of that provision of the Louisiana code which allows general and special pleas to be pleaded together, if consistent, to a general denial that the slaves were afflicted with several maladies known to defendant, from which some had died and others had been rendered useless, — such answer only specifying a particular fact in aid of the general denial. *Andrews v. Hensler*, 6 Wal. 254.

9. In Louisiana, peremptory exceptions must be considered as specially pleaded, if set forth in writing, in a specific or detailed form, and judgment prayed thereon. *Phillips v. Preston*, 5 How. 278.

**PLEDGE — What constitutes — Rights of Pledgee — Of Pledgor — Of Purchaser.]** If one take personal property which passes by indorsement and delivery in good faith as security for a loan, he may retain it as against the owner until the loan is paid. *Baldwin v. Ely*, 9 How. 580.

2. Where the pledgee parts with the pledge to one who purchases in good faith without notice of any right or claim of the pledgor, the latter cannot recover it from the purchaser without first tendering him the amount due thereon. *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. 321.

3. Possession is of the essence of a pledge; without it no privilege can exist as against third persons, under either the common or the civil law, the Code Napoleon, or the code of Louisiana. Where, therefore, a bank deposits bills and notes with its president and his partner, by way of pledge to secure a loan made by a third party, and the president delivers the bills and notes to the bank officers for collection, with power to substitute other securities therefor, there is not such a delivery and possession as is necessary to create a privilege by the law of Louisiana. [SWAYNE, FIELD, and HARLAN, JJ., dissenting.] *Casey v. Cavaroc*, 96 U. S. 467; *Casey v. New Orleans National Banking Association*, *Id.* 492; *Casey v. Schuchardt*, *Id.* 494.

**PLEDGE** — *continued.*

4. In Louisiana, a conveyance of land, the grantee taking possession and executing an instrument declaring that on non-payment of a certain sum on a day named the land shall be sold and the purchase-money applied, first, to pay that sum, and the residue to the grantor, but that on payment on that day the land shall be reconveyed, does not constitute a conditional sale, but is an *antichresis*, or pledge of immovables. *Livingston v. Story*, 17 Pet. 351.

5. If payment be not made, the remedy is a judicial sale; and a stipulation that, on non-payment, the property shall belong absolutely to the grantee, is void. *Ib.*

6. The Louisiana statute of 1855, which modified the provisions of the code requiring a transfer by indorsement and other formalities, in order to make a good pledge, was in force in 1873. At that time, therefore, the actual delivery of negotiable and other securities was sufficient to constitute a pledge. *Casey v. Schneider*, 96 U. S. 496.

**Bankruptcy** — *How it affects.*

See **BANKRUPTCY** — **EFFECT**, 9; **BANKRUPTCY** — **PRIOR TRANSACTIONS**, 1, 2, 6.

**Executor having no Power under Will** — *Pledge by, not sustained.*

See **EXECUTOR AND ADMINISTRATOR** — **POWERS AND LIABILITIES**, 6.

**Factor** — *Pledge of Goods consigned for Sale, void in Louisiana.*

See **FACTOR**, 8.

**Ship and Cargo.**

See **BOTTOMRY AND RESPONDENTIA**.

**POLICE POWER** — *Charters of Private Corporations held Subject to the Police Power of the States.*

See **CORPORATION** — **CHARTER**, 40 *et seq.*

**Discriminating Municipal Wharfage Charges** — *Not Exercise of Police Power.*

See **TAX** — **POWER**, 34.

**Extent of, notwithstanding Corporate Charters.**

See **CORPORATION** — **CHARTER**, 19–24.

**Municipal Corporations** — *In general.*

See **MUNICIPAL CORPORATION** — **POWERS IN GENERAL**, 12–24.

**Power of States.**

See **STATES** — **RIGHTS AND POWERS**, 12 *et seq.*

**Regulation of Rates for Transportation on Railroads.**

See **RAILROAD** — **STATE REGULATION**.

**Regulation of Commerce as affecting Exercise.**

See **COMMERCE**.

**POLICY** — *Insurance, in General.*

See **INSURANCE**.

**Public, as affecting Validity of Contracts.**

See **CONTRACT** — **WHAT CONSTITUTES**, 36 *et seq.*

**POLITICAL QUESTIONS** — *Federal Courts have no Jurisdiction to decide Questions of Sovereignty, National Boundary, etc.*

See **FEDERAL COURTS** — **JURISDICTION**, 21 *et seq.*

**POLLING JURY** — *Waiver of Right to poll.*

See **TRIAL** — **TRIAL BY JURY**, 115.

**POLYGAMY** — *Congress may deny Polygamists in the Territories the Right to vote.*

See **CONGRESS**, 16.

*In general.*

See **BIGAMY**.

**POOR DEBTOR** — *Discharge of Debtor imprisoned on Execution out of a Federal Court, on an Order of Justice of Peace under a State Law for the Relief of Imprisoned Debtors, an Escape.*

See **ESCAPE**.

*In general* — *Liability* — *Discharge, etc.*

See **INSOLVENCY**, 19 *et seq.*

**POSSESSION** — *Adverse* — *In general.*

See **LIMITATION** — **ADVERSE POSSESSION**.

**Chattel** — *Whether Possession of, is under a Sale or but a Continuation of Prior Possession* — *For the Jury.*

See **JURY**, 43.

*Effect, in general, as Foundation of Rights.*

See **LIMITATION** — **ADVERSE POSSESSION**.

*Enough to support Ejectment against a Mere Intruder* — *Right to Possession necessary.*

See **EJECTMENT** — **IN GENERAL**, 15, 16.

*Ground of Claim to Public Lands in California.*

See **LANDS OF UNITED STATES** — **GRANT FROM FORMER GOVERNMENTS**.

*Interest divested in Time of War by Loss of Possession.*

See **CAPTURE** — **CAPTOR'S RIGHTS**, 13.

*Mortgage* — *Rights of Parties to Possession.*

See **RAILROAD** — **MORTGAGE**, 36, 37.

*Notice of Unrecorded Deed* — *Other Incumbrances.*

See **VENDOR AND PURCHASER** — **BONA FIDE PURCHASER**, 7 *et seq.*

*Pledge* — *Possession Essence of.*

See **PLEDGE**, 3.

*Presumption from Possession by Legatee that Possession was by Consent of Executor.*

See **DEVISE AND LEGACY**, 80.

*Prima Facie Evidence of Title sufficient to support Ejectment on Trespass qu. cl.*

See **EJECTMENT** — **IN GENERAL**, 20.

*Recovery by Landlord.*

See **LANDLORD AND TENANT**.

*Retention of, by Vendor as a Badge of Fraud.*

See **BANKRUPTCY** — **PRIOR TRANSACTIONS**.

**POSSESSION — continued.**

*Sale — Change of Possession — Otherwise Fraudulent.*

See *SALE — WHAT CONSTITUTES*, 26 *et seq.*

*Sufficient to give Notice and Effect to Unrecorded Deed.*

See *DEED — REGISTRATION AND NOTICE*, 10.

**POSTMASTER-GENERAL — Powers, Liabilities, etc.**

See *POST-OFFICE DEPARTMENT*.

**POST-NUPITAL SETTLEMENT — Powers under Deed of Settlement.**

See *POWER*, 27.

**POST-OFFICE — Postmaster — Power and Liability — Evidence — Liability of Surety — Compensation of Deputy, etc.**

See pl. 1-9.

*Carriers of the Mails — Public Notice of Proposals — What constitutes a Contract — Construction — Suspension of Service — Extra Compensation.*

See pl. 10-16.

*Violations of the Postal Laws — Indictment for advising, etc., a Carrier to rob the Mail — Carriage out of the Mail — Obstructing the Passage of the Mail.*

See pl. 17-21.

*Examination of Letters, etc., in the Mail.*

See pl. 22.

1. — *Postmaster — Power and Liability — Evidence — Liability of Surety — Compensation of Deputy, etc.* Under the act of March 3, 1825, § 32 (4 Sts. 112), a postmaster who leaves his office in the course of a quarter is liable to a double charge for failure to render his account within a month from the end of the quarter. *United States v. Roberts*, 9 How. 501.

2. An initial letter written on the envelope of a newspaper is not a "writing or memorandum" forbidden by that act, and will not justify a postmaster in detaining the paper from the person to whom it is directed for the payment of letter postage. *Teal v. Felton*, 12 How. 284.

3. To maintain an action against a postmaster for negligence in forwarding a letter, the plaintiff must prove that he was thereby damaged. *Dunlop v. Munroe*, 7 Cranch, 242.

4. Under an allegation of negligence of a postmaster, evidence of negligence of his sworn assistant is inadmissible. *Ib.*

5. Parol evidence is inadmissible to prove that one set of written instructions from the postmaster-general to a postmaster superseded another. *Ib.*

6. If a postmaster, in paying a contractor, neglect to observe the regulations of the department as to taking receipts and notifying the de-

**POST-OFFICE — continued.**

partment, and by reason thereof the contractor be not charged with the payment in the settlement of his account, the surety of the postmaster is not entitled to the credit in an action on the official bond. *United States v. Roberts*, 9 How. 501.

7. Neglect of the postmaster-general to bring suit against a defaulting postmaster, as required by the act of April 30, 1810 (2 Sts. 602), will not discharge either the postmaster or his sureties from their obligation to the United States, although under that act the postmaster-general be liable for such neglect. *Dox v. Postmaster-General*, 1 Pet. 318.

8. The salary of a deputy postmaster, once fixed, cannot be increased until readjusted on the basis of his quarterly returns by the postmaster-general. Such readjustment is an executive act, taking effect prospectively; and if not performed, the law imposes no obligation to pay an increased salary. *United States v. McLean*, 95 U. S. 750.

9. A deputy postmaster duly commissioned for four years, and within the term suspended according to law until the end of the next session of the senate, and who then resumes the duties of the office, performed during the interim by one designated for that purpose and nominated for the office, but rejected by the senate, is not entitled to compensation during such interim. His claim for compensation rests, not on a contract, express or implied, but on the acts of congress providing for salaries, which clearly prohibit compensation in such a case. *Embry v. United States*, 100 U. S. 680.

10. — *Carriers of the Mails — Public Notice of Proposals — What constitutes a Contract — Construction — Suspension of Service — Extra Compensation.* What, under the act of June 8, 1872, § 243 (17 Sts. 313), is a sufficient public notice by the postmaster-general inviting proposals for the carrying of the mails. *Garfield v. United States*, 93 U. S. 242.

11. Where the post-office department by public notice invites proposals for carrying the mails on a certain route, and the offer of a bidder to carry them is accepted, the government is bound in like manner as though a formal contract had been written out and signed. *Ib.*

12. Notwithstanding the obligation of a railroad company which has received grants of public lands to carry the mails at prices to be fixed by congress or by the postmaster-general, if, by virtue of his authority, the postmaster-general approve a contract fixing a price for such carriage for a specified time, the price thus fixed cannot be reduced during the term without the consent of the company; nor does the right which the postmaster-general has to discontinue or curtail the service, allowing a month's pay as indemnity, give the right to reduce the price fixed by the contract, the service still being required. *Chicago & Northwestern Railway Co. v. United*

**POST-OFFICE — continued.**

*States*, 104 U. S. 680; *Chicago, Milwaukee, & St. Paul Railway Co. v. United States*, Id. 687.

13. The act of June 1, 1872 (17 Sts. 199), authorizing the postmaster-general to contract with the lowest bidder for additional mail service between San Francisco and China and Japan, and providing that all vessels thereafter offered for the service should be of a certain superior class, and the contract made thereunder with a company already having a contract for the existing service, performed by inferior vessels already accepted by the department, the contract also providing that vessels thereafter offered should be of the superior class, held, in the circumstances, to contemplate that the vessels already accepted should be used, and that the necessary additional vessels only need be of the superior class. *Pacific Mail Steamship Co. v. United States*, 103 U. S. 721. And see *United States v. Pacific Mail Steamship Co.*, 104 U. S. 480.

14. A vessel which had started on a voyage with the mail when the act was repealed, held entitled to the compensation due for carrying the mail on that trip out and back, as though the repealing act had not been passed. *Pacific Mail Steamship Co. v. United States*, 103 U. S. 721.

15. An indefinite suspension by the postmaster-general, of service on a mail route within rebel territory, with notice to the contractor that he would be held responsible for a renewal when deemed safe, was a discontinuance entitling the contractor to a month's pay under the act of February 28, 1861 (12 Sts. 177). *Reeside v. United States*, 8 Wal. 38.

16. A claim for compensation for extra services in carrying the mails, if justly due, is not to be deemed waived because the postmaster-general notified the claimant that if he pressed his claim another contract would be annulled, the claimant not having desisted by reason of such threat, and the other contract not having been annulled. *Alvord v. United States*, 95 U. S. 356.

17. — *Violations of the Postal Laws — Indictment for advising, etc., a Carrier to rob the Mail — Carriage out of the Mail — Obstructing the Passage of the Mail.* An indictment under the act of March 3, 1825, § 24 (4 Sts. 109), for advising, procuring, and assisting a mail-carrier to rob the mail, should allege that the carrier in fact committed the offence of robbing, etc. *United States v. Mills*, 7 Pet. 138.

18. But an allegation that the defendant "did procure, advise, and assist" the carrier "to secrete, embezzle, and destroy a letter," etc., held a sufficient averment thereof. *Ib.*

19. The indictment herein, describing the offence in the words of the statute, held sufficient, being for a misdemeanor. *Ib.*

20. A paper folded in the form of a letter, superscribed but not sealed, and containing an order for merchandise, is "mailable matter," within the meaning of the act of March 3, 1845,

**POST-OFFICE — continued.**

§ 10 (5 Sts. 736), and the carriage thereof out of the mail subjects the master of a steamboat running regularly on a mail route to a penalty. *United States v. Bromley*, 13 How. 88.

21. A temporary detention of the mail by the arrest of its carrier on a bench warrant issued by a state court on an indictment for murder, is not an obstruction or retarding of the passage of the mail or its carrier, within the meaning of the act of March 3, 1825, § 9 (4 Sts. 104), that section applying only to acts performed with the intention of obstructing, etc., and not to acts in themselves lawful from which delay unavoidably follows. *United States v. Kirby*, 7 Wal. 492.

22. — *Examination of Letters, etc., in the Mail.* The manner in which letters and sealed packages subject to letter postage in the mails may be opened and examined, stated. *Ex parte Jackson*, 96 U. S. 727.

*Carrier of Mails estopped by Settlement.*  
See ESTOPPEL, 60.

*Congress has Power to regulate Mails.*  
See CONGRESS, 13.

*Deposit of Letter in, when may be proved without Notice to produce Letter.*  
See TRIAL — INTRODUCTION OF EVIDENCE, 40.

*Postmaster — Action against — Jurisdiction of State Courts.*  
See STATE COURTS, 4.

*Postmaster — Liability as Receiver of Public Money.*  
See RECEIVER OF PUBLIC MONEY.

*Postmaster's Bond — Construction.*  
See BOND, 25.

*Postmaster's Bond — Suit on.*  
See CIRCUIT COURT — JURISDICTION, 43;  
UNITED STATES — LIABILITY, 36.

*Railway Mail Clerks — Carriage — Federal Question.*  
See ERROR TO STATE COURT — JURISDICTION, 161.

*Receiving, etc., Notes stolen from Mail.*  
See BILLS AND NOTES — IN GENERAL, 2.

**POST-OFFICE DEPARTMENT — Postmaster-General — Power to establish and discontinue Post-offices — To take Bonds from Postmasters — To make Loans, etc.**

See pl. 1-4.

*Claim against the Post-office Department.*  
See pl. 5.

1. — *Postmaster-General — Power to establish and discontinue Post-offices — To take Bonds from Postmaster — To make Loans, etc.* The postmaster-general having power to establish post-offices, has, as incident thereto, power to discontinue them, and may discontinue an office, although the postmaster be appointed by the

**POST-OFFICE DEPARTMENT** — *continued.*

president with the consent of the senate, and for a term of years not yet expired. *Ware v. United States*, 4 Wal. 617.

2. The postmaster-general has authority to take bonds from postmasters, to secure payment of the money received by them in their official capacity. *Postmaster-General v. Early*, 12 Wheat. 136.

3. If the postmaster-general have power to make loans on the public credit or responsibility, it is a power to be exercised only in the regular legitimate operations of his department. Thus, he cannot lawfully take from a clerk in his department a personal certificate of deposit in a broken bank with which the department has had dealings, and credit it to the clerk at its nominal amount; and money paid to balance such a credit may be recovered under the act of July 3, 1836, § 17 (15 Sts. 83). *United States v. Brown*, 9 How. 487.

4. Under act of March 3, 1863, § 5 (12 Sts. 702), providing that whenever the business of a post-office is increased by the nearness of a military or naval force the postmaster-general shall allow a proportionate increase of compensation to the postmaster, it is for the postmaster-general alone to determine whether the exigency has arisen and what the additional compensation shall be. The courts cannot revise his decision. *United States v. Wright*, 11 Wal. 648.

5. — *Claim against the Post-office Department.* It cannot be contended that a claim against the post-office department was not actively pressed because the evidence and arguments were presented to an assistant postmaster-general, instead of to the postmaster-general in person. *Alvord v. United States*, 95 U. S. 356.

*Postmaster-General — Liability for Neglect to bring Suit against Defaulting Postmaster.*  
See **POST-OFFICE**, 7.

*Postmaster-General — Ratification of Lease in Behalf of Government — What constitutes.*  
See **AGENCY**, 41, 42.

*Postmaster-General — Mandamus to compel Performance of a Ministerial Act.*  
See **MANDAMUS**, 18.

**POST ROADS** — *Power of Congress to establish.*  
See **COMMERCE**, 50-53, 60.

**POSTS** — *Meaning of Word in Contract for Transportation of Military Supplies to and from.*  
See **CONTRACT — CONSTRUCTION**, 55.

**POWERS** — *Construction — Various Powers — How construed.*  
See pl. 1-8.

*Execution — Who may execute — What Powers survive.*  
See pl. 9-14.

**POWERS** — *continued.*

*Execution — Various Powers — How executed, etc.*

See pl. 15-32.

1. — *Construction — Various Powers — How construed.* A mere power to dispose of land is not an estate therein, and will not pass under an act confiscating the estates of the donees. *Carver v. Astor*, 4 Pet. 1.

2. A deed settling upon the wife the whole of her estate, with power to dispose of it by appointment or devise, and providing that the trustee shall permit her to take the "interest, rents, and profits" to her own use or the use of such persons as she may appoint, gives her power to convey the fee. *Ladd v. Ladd*, 8 How. 10.

3. A person empowered by a private statute to sell land, held, in the circumstances, to have a special power to be exercised with the consent of the chancellor, — a power not to be exceeded, even with such consent, the chancellor having no jurisdiction under the statute to permit it. *Williamson v. Berry*, 8 How. 495; *Williamson v. Irish Presbyterian Congregation*, Id. 565; *Williamson v. Ball*, Id. 566.

4. A power to sell and exchange lands includes the power to make partition of them. *Phelps v. Harris*, 101 U. S. 370.

5. And it seems that a power "to dispose of" lands and "invest the proceeds" does also. *Ib.*

6. A power to "sell, dispose of, contract, and bargain for" a certain tract of land, held not to authorize a relinquishment to the state for taxes which were not a charge against the owner, but only a lien on the land. *Clarke v. Courtney*, 5 Pet. 319.

7. A power to convey land must possess the same requisites and observe the same solemnities that are necessary in a deed conveying the land. *Clark v. Graham*, 6 Wheat. 577.

8. A trustee may, by will, empower his executors to sell trust lands, and in such case the executors become trustees for the original cestuis que trust. *Taylor v. Benham*, 5 How. 233.

9. — *Execution — Who may execute — What Powers survive.* A power to A. and his executors or administrators to sell land, may be executed by the executors of the executors of A. *Daly v. James*, 8 Wheat. 495.

10. When the will directs that land be sold, without declaring by whom, the executors take the power by implication; and if a joint execution of it do not appear to have been intended, it will survive. *Peter v. Beverly*, 10 Pet. 532. See *United States Bank v. Beverly*, 1 How. 134.

11. The possession of the legal estate, accompanied with a power of sale, is a power coupled with an interest. *Ib.*

12. Where a benefit, by way of trust, is to be conferred by the execution of a power, the power does not become extinct by the death of one of the trustees. *Ib.*



**POWERS — continued.**

13. An imperative direction to executors to sell land and dispose of the proceeds in a certain way, is a power coupled with a trust, which survives. *Taylor v. Benham*, 5 How. 233.

14. Where the donees of a power are invested with the legal estate in trust to pay over the income during certain lives, and then they or their successors to appoint persons to designate charities among which the donees are to distribute the fund, the power is one coupled with an interest, and may be executed by the survivor. *Loring v. Marsh*, 6 Wal. 337.

15. — *Execution — Various Powers — How executed, etc.*] A naked power not coupled with an interest cannot be exercised without previous compliance with every prerequisite. *Williams v. Peyton*, 4 Wheat. 77.

16. At law, the exercise of a power after the time limited by the donor is void. *Daly v. James*, 8 Wheat. 495.

17. Although a private sale is not a good execution of a power to sell at auction, even if the interests of the parties be thereby promoted, yet a purchaser from a trustee who so sells under such a power cannot object to the character of the sale, if it be sanctioned by the *cestui que trust*. *Greenleaf v. Queen*, 1 Pet. 138.

18. To the due execution of a power, neither a recital of, nor even an express reference to, it is necessary; the intent to execute it is matter in pais, to be collected from all the circumstances. *Crane v. Morris*, 6 Pet. 598; *Kelly v. Morris*, Id. 622.

19. Sheriff's deeds are no exception to the rule that deeds executed under powers must refer thereto. *French v. Edwards*, 13 Wal. 506.

20. A sale of land under a power in a will is not vitiated by an omission to record the will, unless recording is required by statute. *Taylor v. Benham*, 5 How. 233.

21. A power to be executed under "hand and seal, attested by three credible witnesses," is well executed although the attestation clause certify to the sealing and delivery, and not to the signing. *Ladd v. Ladd*, 8 How. 10.

22. A deed in due form by one having a power to sell will pass title, although executed and delivered under a decree rendered in a controversy between the attorney and one to whom he had agreed to sell. *Hanrick v. Neely*, 10 Wal. 364.

23. For proof of the execution of a power, resort may be had to the *in testimonium* clause, and to evidence *aliunde*. *Ladd v. Ladd*, 8 How. 10.

24. A power to sell on mortgage is not exhausted by once mortgaging. *Williamson v. Berry*, 8 How. 495; *Williamson v. Irish Presbyterian Congregation*, Id. 565.

25. A mortgage of land by the owner of a moiety, who holds a power to sell from the owner of the legal title to the residue, will pass only the mortgagor's title, there being no reference in the

**POWERS — continued.**

mortgage to an execution of the power. *Shirras v. Caig*, 7 Cranch, 34.

26. If a statute authorize trustees to be appointed by the chancellor to divide land held in trust for A. for life, remainder to his children, as soon "as conveniently may be," to hold one moiety to those uses, to subdivide and sell the other to the best advantage, and to invest the proceeds and pay the interest to A., and the chancellor order a sale of the eastern moiety, and a subsequent statute authorize the trustees, under that or any subsequent order, to sell or to mortgage the premises which the chancellor has permitted or may permit him to sell, the power to divide will not be deemed exhausted by the first partition, and the chancellor may permit a sale of the southern instead of the eastern moiety. *Williamson v. Suydam*, 6 Wal. 723.

27. Where a man conveyed land in trust for the separate use of his wife for her life, with a general power of appointment, and, in case of her failure to appoint, to her heirs in fee, the conveyance giving her full power to lease, assure, convey, dispose of, and sell, it was held that, without regard to the question of whether, under the local statute, the wife took an equitable or a legal estate, her appointment in favor of one and her heirs, although it might have been superseded by a sale upon a valuable consideration, was not superseded by a subsequent voluntary conveyance made for the purpose of avoiding the appointment, and that, therefore, the heirs of the appointee could maintain a suit in equity to quiet their title as against one claiming as heir of the wife, to whom the land had been reconveyed by her grantee. *Bowen v. Chase*, 94 U. S. 812; *Bowen v. Chase*, 98 U. S. 254.

28. Where, under a deed of settlement, one has the full right to dispose of a fund, the right to a part of it may be released, or a mistake in the deed may be rectified by the donee. *Blake v. Hawkins*, 98 U. S. 315.

29. The question of whether a power of appointment is executed by a will may be determined on a construction of the whole instrument. While an avowal, in the introductory clause, of a purpose to execute the power is not in itself an execution, such an avowal may be important in construing subsequent provisions. *Ib.*

30. Where a married woman devises land to her husband for life, in trust, and appoints him executor with power to incumber the estate "by way of mortgage or trust deed, and renew the same" for the purpose of raising money to pay off any existing incumbrances, "as though he held an absolute estate," he may, on its maturity, extend a mortgage executed by his wife and himself to secure his own indebtedness. *Warner v. Connecticut Mutual Life Insurance Co.*, 109 U. S. 357.

31. It is not necessary to a valid exercise of the power that the instrument by which it is made refer to the power, or the property the

**POWERS — continued.**

subject of the power, where its apparent interest is to continue the covenants and lien of the mortgage, an intent to be fulfilled only through the power, the rule being that where an instrument cannot otherwise operate according to the intent it must be referred to the power, which alone can make it effectual. *Ib.*

32. Nor is notice to the remainder-man necessary, although he be deemed to stand in the position of a surety, the rule requiring a strict construction in a case of suretyship applying only to the contract of a suretyship itself, and not to matters collateral or incidental. *Ib.*

*Administrator de Bonis non — Unusual Powers conferred on Executor — When they pass.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 91.

*Agent — Construction of Powers.*

See AGENCY, 1 *et seq.*

*Agent — Delegation of Power — In general.*

See AGENCY, 54, 55.

*Appointment — Power of — Does not pass to assignee in Bankruptcy.*

See BANKRUPTCY — PROCEEDINGS TO CONVERT ESTATE, 5.

*Corporate — In general.*

See CORPORATION; MUNICIPAL CORPORATION.

*Executor or Administrator — Powers must be strictly pursued.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 34.

*Executor to sell — Purchaser presumed to have Notice of Want of Power.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 55.

*Executors — When Power to dispose of Estate in Charity will not be executed by Court.*

See CHARITY, 33.

*Factor cannot delegate his Power to sell.*

See FACTOR, 4.

*Power of Attorney — In general.*

See AGENCY.

*Power of Attorney — Power executed by Insane Person void.*

See INSANITY.

*Power of Attorney — Revocation.*

See AGENCY, 45 *et seq.*

*Sale — Power of, in Mortgage.*

See MORTGAGE — POWER OF SALE.

**PRACTICE — Abandoned and Captured Property Acts — Practice under.**

See ABANDONED AND CAPTURED PROPERTY.

*Abatement — In general.*

See PLEADING — DILATORY PLEAS.

**PRACTICE — continued.**

*Admiralty — In general.*

See ADMIRALTY — PRACTICE.

*Appeal — In general.*

See APPEAL; APPEAL AND ERROR.

*Attachment — In general.*

See ATTACHMENT.

*Awards — Practice in the Matter of.*

See ARBITRATION AND REFERENCE.

*Bankruptcy — In general.*

See BANKRUPTCY.

*Bonds — Actions on.*

See BOND — ACTION, 22 *et seq.*

*Certificate of Division.*

See CASES CERTIFIED.

*Certiorari — In general.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE; CERTIORARI.

*Confiscation Acts — Practice in Proceedings thereunder.*

See CONFISCATION, 22 *et seq.*

*Continuance — Practice in Matter of.*

See CONTINUANCE.

*Corporations — Suits by and against.*

See CORPORATION — SUITS; MUNICIPAL CORPORATION.

*Costs — Matters of Practice.*

See COSTS.

*Court of Claims — In general.*

See COURT OF CLAIMS — PRACTICE.

*Covenant — Practice in Action.*

See COVENANT — ACTION.

*Criminal — In general.*

See CRIMINAL PROCEDURE.

*Damages — In general.*

See DAMAGES, 53 *et seq.*

*Default — Practice in Matter of.*

See JUDGMENT — OPENING AND REVERSAL.

*Discontinuance — Matters of.*

See DISCONTINUANCE.

*District Courts — In general.*

See DISTRICT COURT — PRACTICE.

*Divorce — Practice in Proceedings therefor.*

See DIVORCE.

*Ejectment — In general.*

See EJECTMENT — PLEADING AND PRACTICE.

*Eminent Domain — Taking Property in Exercise of Right.*

See EMINENT DOMAIN, 9 *et seq.*

*Equity — Disposal of Cross-bill.*

See EQUITY PLEADING — CROSS-BILL, 12.

*Equity — In Matters of Decree.*

See EQUITY — DECREE.

*Equity — In general.*

See EQUITY.

*Equity — Where Bill is multifarious.*

See EQUITY PLEADING — BILL, 17, 18.

**PRACTICE** — *continued.**Error — In general.*See **APPEAL**; **APPEAL AND ERROR**.*Examination of Witnesses.*See **WITNESS**.*Exceptions — Practice in Matter of.*See **EXCEPTIONS**.*Executors or Administrators — Suits by or against.*See **EXECUTOR AND ADMINISTRATOR** — **SUITS**.*Federal Courts — In general.*See **FEDERAL COURTS** — **PRACTICE**.*Foreclosure Proceedings.*See **MORTGAGE** — **FORECLOSURE**.*Forfeiture for Breach of Revenue Laws — Practice in Proceedings therefor.*See **DUTIES** — **PENALTIES AND FORFEITURES**, 53 *et seq.**Fraudulent Conveyances — Practice under Statutes avoiding.*See **FRAUDULENT CONVEYANCE**, 46 *et seq.**Garnishment Proceedings.*See **GARNISHMENT**.*Habeas Corpus — Practice in Issue, etc.*See **HABEAS CORPUS**.*Husband and Wife — Suits by, against, and between.*See **HUSBAND AND WIFE**, 45 *et seq.**Infringement of Patents — Proceedings therefor.*See **PATENT** — **INFRINGEMENT**.*Injunctions — Practice in Issue, etc.*See **INJUNCTIONS**, 49.*Insurance — Actions on Policies.*See **INSURANCE**.*Judgments — Rendition — Entry — Arrest.*See **JUDGMENT**.*Jury — Impanelling.*See **JURY**, 9 *et seq.**Limitation of Liability of Ship-owners — Practice under the Act.*See **SHIPPING** — **LIMITATION OF LIABILITY**.*Limitation — Practice under Statutes.*See **LIMITATION** — **PLEADING AND PRACTICE**.*Mandamus — Issue — Service — Return, etc.*See **MANDAMUS**, 78 *et seq.**New Trial — Proceedings for.*See **NEW TRIAL**.*Pleading at Law — Practice in Matters of.*See **PLEADING** — **PRACTICE IN PLEADING**.*Prize Courts — In general.*See **PRIZE** — **PRACTICE**.*Probate — Settlement of Estates.*See **EXECUTOR AND ADMINISTRATOR**.*Proceedings to determine Conflicting Claims to Mines.*See **MINES**, 12 *et seq.***PRACTICE** — *continued.**Removal of Causes from State Courts.*See **REMOVAL OF CAUSES**.*Replevin — Practice in Action.*See **REFLEVIN**.*Revival of Actions.*See **ACTION**, 8 *et seq.**Specific Performance — Proceedings for.*See **SPECIFIC PERFORMANCE**, 55 *et seq.**States — Suits by and against.*See **STATES** — **SUITS**, 22 *et seq.**Supreme Court — In general.*See **SUPREME COURT** — **PRACTICE**.*Trial by Jury waived — Practice.*See **TRIAL** — **TRIAL BY COURT**, 3, 4.*Trial — Practice on, in general.*See **TRIAL**.*Trover — Practice in.*See **TROVER**.*Trust Property — Suits respecting.*See **TRUST** — **LEGAL PROCEEDINGS**.*United States — Suits by and against.*See **UNITED STATES** — **SUITS**.*Writ of Right — Proceedings thereon.*See **WRIT OF RIGHT**.**PRE-EMPTION** — *Lands in Pennsylvania.*See **LANDS OF STATES** — **PENNSYLVANIA**.*Lands of Virginia.*See **LANDS OF STATES** — **VIRGINIA AND KENTUCKY**, 4, 5.*Lands of the United States — In general.*See **LANDS OF UNITED STATES** — **PRE-EMPTION**.**PREFERENCE** — *Bankruptcy — Fraudulent Preference — What constitutes.*See **BANKRUPTCY** — **PRIOR TRANSACTIONS**, 17 *et seq.**Creditors — In general.*See **ASSIGNMENT FOR BENEFIT OF CREDITORS**.**PREFERRED DEBTS** — *What constitute.*See **BANKRUPTCY**.**PRESCRIPTION** — *Limitation of Actions.*See **LIMITATION**.*Ways — Establishment by.*See **WAY**.**PRESENTMENT** — *Bills and Notes — Acceptance — Payment.*See **BILLS AND NOTES**.*Check — Presentment for Payment — What sufficient.*See **CHECK**, 1.

**PRESIDENT** — *Power, in general* — *Proclamation.* Under the act of February 28, 1795 (1 Sts. 494), the president has power, in case of an insurrection against the government of a state, to decide what is the duly constituted government. *Luther v. Borden*, 7 How. 1.

2. In the absence of congress, it is the duty of the president to recognize the existence of civil war, and to act with reference thereto; and in pursuance thereof he may institute a blockade of the ports of that section of the country which is in rebellion. [TANEY, C. J., and CATRON, NELSON, and CLIFFORD, JJ., dissenting.] *The Amy Warwick*, 3 Black, 635; *The Hiawatha*, Id.; *The Brilliant*, Id.; *The Crenshaw*, Id.

3. The president, whether described by his official title or as a citizen of a state, cannot be restrained by injunction from carrying into effect an act of congress alleged to be unconstitutional; and a bill for such purpose will not be permitted to be filed. *Mississippi v. Johnson*, 4 Wal. 475.

4. Where, under a convention between the United States and Mexico, providing for a submission to a commission of claims of citizens of either country against the government of the other, and declaring that the result of the proceedings of the commission should be deemed a full, final, and perfect settlement of every claim, an award was made against the Mexican government, and that government paid to the United States the amount found due, it was held that the president might reopen the case on allegations of fraud in procuring, before the commission, the allowance of a certain claim against the Mexican government, and that, a treaty with Mexico having been negotiated, and being before the senate on the question of its ratification, mandamus would not issue to compel the secretary of state to pay over instalments of the award, although previous instalments had been paid with knowledge that the claim was charged to have been a fraudulent one. *Frelinghuysen v. Key*, 110 U. S. 63.

5. *Semble*, that instructions from the executive that are not supported by law are not such as an inferior officer is bound to obey. *Otis v. Bacon*, 7 Cranch, 589.

6. An executive proclamation — for instance, a proclamation removing a restriction upon commercial intercourse with the inhabitants of a state in insurrection — takes effect when it is duly signed and sealed, and deposited in the department of state, and affects the rights to property of parties to transactions entered into thereafter without regard to actual publication. [MILLER, FIELD, BRADLEY, and HUNT, JJ., dissenting.] *Lapeyre v. United States*, 17 Wal. 191; *United States v. Norton*, 97 U. S. 164.

7. It takes effect on the beginning of the day on which it is so filed, etc. *United States v. Norton*, 97 U. S. 164.

*Acts through Heads of Departments.*

See EXECUTIVE DEPARTMENTS, 3, 4.

**PRESIDENT** — *continued.*

*Appeals in Pre-emption Cases* — *Power to hear.*

See LANDS OF UNITED STATES — LAND OFFICE, 33.

*Authority* — *What is an Exercise thereof.*

See RECEIVER OF PUBLIC MONEY, 19, 20.

*Commander-in-chief* — *Power.*

See ARMY, 29 *et seq.*

*Commander-in-chief* — *Power* — *May direct commitment of one duly sentenced for attempting to desert from the Navy.*

See NAVY, 22.

*Commander-in-chief* — *Power to establish Provisional Courts in Time of Civil War.*

See PROVISIONAL COURT, 1.

*Instructions to Commander of Public armed Vessel as Justification for Illegal Act.*

See NAVY, 7.

*Legislation* — *Approval of Bill* — *Affixing of Date, not necessary.*

See STATUTES — ENACTMENT, 7.

*Militia* — *Power to call out.*

See MILITIA, 1, 2.

*Pardoning Power* — *In general* — *Effect.*

See PARDON. See also ABANDONED AND CAPTURED PROPERTY, 5.

*Prize Court* — *No Power to establish.*

See PRIZE — JURISDICTION, 10.

*Proclamation of Suppression of Rebellion.*

See ABANDONED AND CAPTURED PROPERTY, 25.

*Proclamation of Amnesty a Public Act.*

See EVIDENCE — JUDICIAL NOTICE, 9.

*Public Lands* — *Power over* — *Reservation, etc.*

See LANDS OF UNITED STATES — DISPOSAL, 4 *et seq.*

*Removal of Naval Officer in Time of War* — *Appointment of Successor as operating Removal.*

See NAVY, 21.

*Trading with the Enemy* — *License under Act of 1861* — *President alone had Power to grant.*

See BLOCKADE, 39.

*Trading with the Enemy* — *License* — *Effect.*

See TRADING WITH ENEMY, 8, 12 *et seq.*

*War* — *Act of Executive inaugurating* — *Effect on Contract* — *Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 114.

**PRESUMPTIONS** — *Presumption that Things are rightly done* — *As to Possession of Part of Indenture* — *Of Contract* — *Of Dissolution of Contract* — *Identity of Grantor* — *Grant of Public Land* — *Of Treasury Permit* — *Presumption that Note paid was surrendered.* If a person who is both executor and trustee make a payment

**PRESUMPTIONS — continued.**

agreeably to a decree of court, he will be presumed to act therein in the capacity in which the act would be rightful and effective. *Yeaton v. Lynn*, 5 Pet. 224.

2. The parties to a foreign bill having liquidated the damages to the holder on protest for non-payment, it was held to be presumed that they adopted the proper rate. *United States Bank v. Daniel*, 12 Pet. 32.

3. Although a refusal to produce books on notice will warrant all fair intendments in favor of secondary evidence of their contents, it is not, of itself, an element from which a presumption as to the point sought to be proved can be drawn. *Hanson v. Eustace*, 2 How. 653.

4. If a party produce one part of an indenture signed by the other party, it is to be presumed that such other party has possession of the other part signed by the party producing. *Hallett v. Collins*, 10 How. 174.

5. Where the United States has paid a railroad company for carrying the mails, and the company has since continued to carry them, it will be presumed that there was a contract, within the provision of an internal revenue act assessing a tax on the receipts of railroad corporations transporting the mails under contracts. *Western Union Railroad Co. v. United States*, 101 U. S. 543.

6. The dissolution of a contract passing the title to land on a condition subsequent, for breach of the condition, and the recovery of possession, cannot be presumed from a subsequent conveyance from the same grantor to another grantee. *Anderson v. Bock*, 15 How. 323.

7. It is to be presumed that a consignment of merchandise to a foreign country is accompanied by an invoice. *Turner v. Yates*, 16 How. 14.

8. Where the holder of bonds fully secured by a first mortgage, and also of bonds insufficiently secured by a second mortgage of the same property, surrendered bonds of the latter class upon a general offer of the debtor to its creditors to issue other bonds, a part with the same and a part with other security, in lieu thereof, the surrender was held, in the circumstances, not to raise a presumption of an intent to give up any rights under the bonds of the first class, nor to impose any equitable obligation to yield such rights. *Wabash & Erie Canal Co. v. Beers*, 2 Black, 448.

9. After fifty years, it will not be presumed that a deed by James S., of A., purporting to convey certain land, was not by J. S., of B., in the same county, who owned the land, the weight of evidence tending to show identity. *Mackay v. Easton*, 19 Wal. 619.

10. In this country there can seldom be occasion to invoke the presumption of a grant from the government, except in cases of very ancient possessions running back to colonial days, as, since the commencement of the present century, a record has been preserved of all such grants. There is, for instance, no presumption of an ear-

**PRESUMPTIONS — continued.**

lier grant, where the defendant in ejectment for a lot in Washington traces title through a conveyance duly executed in 1866, by the mayor under authority of an act of congress, and the plaintiff relies on uninterrupted and exclusive possession from 1828 until the time of the defendant's entry in 1867. *Oaksmith v. Johnston*, 92 U. S. 343.

11. Where a statute makes a deed of land already sold by certain public officers *prima facie* evidence of title to the purchaser, compliance with the terms on which the sale was to be made, *e. g.*, sufficient notice, is to be presumed, and the burden of proving non-compliance is on him who asserts it. *Mumford v. Wardwell*, 6 Wal. 423.

12. The grant of a treasury permit to buy cotton, made under regulations allowing a grant only where the country was occupied by the federal forces, raised a presumption that the country to which the permit extended was so occupied. *Butler v. Maples*, 9 Wal. 766.

13. Notes paid are presumed to have been surrendered at the time of payment. *Lyman v. United States Bank*, 12 How. 225.

**Abandonment of Demurrer in Equity.**

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 321.

**Abandonment of Right to Letters-patent.**

See PATENT — ISSUE.

**Acceptance of Goods sold — When presumed.**

See SALE — WHAT CONSTITUTES, 45 *et seq.*

**Acceptance of Official Bond.**

See BANK, 59.

**Acts of Corporations — Presumptions applicable thereto.**

See CORPORATION — SUITS, 25.

**Appeal or Error — What presumed on.**

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 309 *et seq.*

**Appeal-bond — When presumed to be for a Sufficient Sum.**

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 319.

**Appraisement presumed to be made at Collector's Request.**

See DUTIES — ASSESSMENT, 23.

**Authority — Acts of Parents respecting Estates of their Children.**

See EVIDENCE — WEIGHT AND CONCLUSIVENESS, 11.

**Bank's Negligence in misplacing Bill received for Collection.**

See BANK, 31.

**Bill indorsed to Treasurer of United States presumed to have been taken in Lawful Discharge of Duty.**

See UNITED STATES — SUITS, 3.

**Blockade presumed to continue until Notice of Discontinuance.**

See BLOCKADE, 5.

**PRESUMPTIONS** — *continued.*

*Board of Survey — Presumption in Favor of Finding.*

See CONTRACT — PERFORMANCE AND BREACH, 29.

*Citizenship necessary to Jurisdiction — When presumed, Papers being destroyed.*

See REMOVAL OF CAUSES, 91.

*Citizenship — When presumed from Residence.*

See CIRCUIT COURT — JURISDICTION, 53.

*Compliance with Conditions attached to Power to convey, when conclusive.*

See AGENCY, 7.

*Consent of Executor — Presumed from Long Possession by Legatee.*

See DEVISE AND LEGACY, 80.

*Consequences of Acts — Presumption of Intention.*

See BANKRUPTCY — PRIOR TRANSACTIONS, 50.

*Constitutionality of Statute — Presumption in Favor.*

See STATUTE — CONSTRUCTION, 16, 17.

*Continuance of Domicile — Domicile of Widow presumed to be that of the Husband.*

See DOMICILE, 1.

*Conveyance presumed from giving Notes for Purchase-money.*

See VENDOR AND PURCHASER — IN GENERAL, 11.

*Damage to Tow — When it raises Presumption of Want of Care and Skill on Part of Tug.*

See TUGS AND TOWAGE, 2.

*Death, when presumed — Within Seven Years.*

See DEATH, 4 *et seq.*

*Deed — Whole of a Large Tract of Land presumed to have been held under an Ancient Deed.*

See EJECTMENT — IN GENERAL, 21.

*Deed of Partition between Joint Tenants — When presumed.*

See JOINT TENANTS, 2.

*Deed, when presumed to have been delivered.*

See DEED — DELIVERY, 3 *et seq.*

*Discharge and Extinguishment of Trust — Reconveyance — When presumed.*

See TRUST — TRUSTEE, 36-38.

*Discharge of Official Duty.*

See ABANDONED AND CAPTURED PROPERTY, 27, 28.

*Ejectment — Proof of Title as raising Presumption of Possession within Statute Period.*

See EJECTMENT — IN GENERAL, 22.

*Error — Presumption against.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 438.

*Exemplification of Copies of State Statutes — Authority of Person sealing presumed.*

See EVIDENCE — DOCUMENTARY, 40.

**PRESUMPTIONS** — *continued.*

*Findings in the Admiralty — Presumptions favorable.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 330 *et seq.*

*Fraud from Lapse of Time — Presumption against Imputation.*

See FRAUD — IN GENERAL, 8.

*From Evidence, mixed of Law and Fact — For Court.*

See JURY, 26.

*Grant — Public — Presumption in Favor.*

See LANDS OF STATES — GEORGIA, 7.

*Grants by Spanish Governors of Florida, etc. — Regularity, etc.*

See LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS, 161, 162, 169, 195, 207.

*Grant of Lands — Presumption of Regularity.*

See LANDS OF STATES — NORTH CAROLINA AND TENNESSEE.

*Grant — When presumed.*

See GRANT, 4; LIMITATION — ADVERSE POSSESSION, 33 *et seq.*

*Indorser's Possession of Indorsed Paper — Presumption from.*

See BILLS AND NOTES — INDORSEMENT, 6.

*Infringement of Patent — No Presumption that Persons who bought of Infringer would have bought of Patentee.*

See PATENT — INFRINGEMENT, 172.

*Instructions to Jury — What presumed in Aid.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 316.

*Insurers presumed to know State and Incidents of Trade in which Property is embarked.*

See INSURANCE — MARINE, 15.

*Issue of Citation is to be presumed, and may be proved aliunde.*

See ERROR — BRINGING AND PERFECTING, 77.

*Joint Tenancy — Land held in Joint Names of several presumed to be held in Joint Tenancy or Tenancy in Common.*

See PARTNERSHIP, 9.

*Judgments and Decrees — Presumptions favoring.*

See JUDGMENT — CONCLUSIVENESS, 6.

*Judgment against Executor de Bonis Propriis for Costs — Regularity presumed.*

See EXECUTOR AND ADMINISTRATOR — SUITS, 36.

*Judgment — Presumption in Favor.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 352, 382; CONFISCATION, 48, 49.

*Judgment — Satisfaction of, after Twenty Years.*

See JUDGMENT — SATISFACTION, 1.

**PRESUMPTIONS** — *continued.*

*Jurisdiction of Court of General Jurisdiction*  
— *Presumption in Favor.*

See COURT — IN GENERAL, 34 *et seq.*

*Jurisdiction of Federal Courts* — *No Presumption in Favor.*

See FEDERAL COURTS — JURISDICTION, 41.

*Jury presumed to have been waived, when.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 374.

*Land Company described in Deed as Grantee presumed capable of taking.*

See DEED — REQUISITES, 2.

*Legitimacy — Presumption in Favor.*

See LEGITIMACY.

*License to use Patented Invention.*

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*Marriage by one habited as a Priest.*

See MARRIAGE, 10.

*Marriage presumed to be contracted in Good Faith.*

See DESCENT, 13.

*Members of Firm presumed to have Access to Books of Firm, etc. — Knowledge of Partner — When imputed to Firm.*

See PARTNERSHIP, 37-39.

*Naturalization from long holding of Land.*

See NATURALIZATION, 12.

*Necessity — Proof of Necessity for Supplies, etc., to Ship raises Presumption of Necessity for Credit, etc.*

See MARITIME LIEN, 11, 15, 18.

*Neutral Ownership — Presumption, how repelled.*

See PRIZE — PRACTICE, 34.

*Notice — Purchaser at Sale by Executor presumed to have Notice of Want of Power.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 55.

*Omnia Rite, etc. — Acts of Public Officer — Presumption of — Discharge of Duty.*

See OFFICER, 23 *et seq.*

*Omnia Rite, etc. — Adjourned Term of Court presumed to have been regularly called and held.*

See COURT, 26.

*Omnia Rite, etc. — Applies how, in Acknowledgment of Deed.*

See DEED — ACKNOWLEDGMENT, 6.

*Omnia Rite, etc. — Applies in Confiscation Proceedings.*

See CONFISCATION, 34, 47-49.

*Omnia Rite, etc. — Applies on Support of a Warrant of Arrest in Due Form.*

See CRIMINAL PROCEDURE, 2.

*Omnia Rite, etc. — Applies on Error where the Record does not show Regularity respecting Jury.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 311.

**PRESUMPTIONS** — *continued.*

*Omnia Rite, etc. — Applies to Judicial Sales, Judgments, Orders, etc.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 43 *et seq.*

*Omnia Rite, etc. — In Case of Sale, etc., of Abandoned and Captured Property.*

See ABANDONED AND CAPTURED PROPERTY, 27, 28.

*Omnia Rite, etc. — Commissioner of Patents — Presumption in Favor of Regularity of Act.*

See PATENT — ISSUE, 47.

*Omnia Rite, etc. — Person capable of acting in Two Capacities, presumed to act in One which would render Act rightful.*

See PRESUMPTION, 1.

*Omnia rite, etc. — President presumed to have directed the giving of Civil Jurisdiction to Provost Court.*

See COURT, 39.

*Order or Consent of Parties for Further Proof when Parties join in executing Commission.*

See ADMIRALTY — PRACTICE, 83.

*Ouster not presumed in Favor of Intruder.*

See LIMITATION — ADVERSE POSSESSION, 27.

*Partition — When presumed from Lapse of Time, etc.*

See PARTITION, 4.

*Patent for Public Lands — Presumed to have been regularly issued.*

See LANDS OF UNITED STATES — PATENT, 44.

*Payment of Mortgage Debt — Mortgagee in Possession.*

See MORTGAGE — PAYMENT, 3.

*Petition for Removal not in the Record — Presumed defective and therefore disregarded.*

See REMOVAL OF CAUSES, 92.

*Power to Tax — Relinquishment not presumed.*

See TAX — POWER, 84 *et seq.*

*Property purchased by Wife when Husband is insolvent presumed not to have been purchased with her Funds.*

See FRAUDULENT CONVEYANCE, 32.

*Record, etc., on Error to State Court — Presumption in Aid.*

See ERROR TO STATE COURT — PROCEEDINGS ABOVE, 39 *et seq.*

*Regularity of Sale by Executor or Administrator for Payment of Debts — Judgments, Orders, etc.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 48 *et seq.*

*Reissued Letters-patent presumed to be for same Invention as Original.*

See PATENT — REISSUE, 44.

**PRESUMPTIONS** — *continued.*

*Restrictions on Rights of Absolute Ownership in Lands* — *Not presumed.*

See DEED — CONSTRUCTION, 26.

*Sale on Foreclosure* — *Favorable to Regularity.*

See RAILROAD — MORTGAGE, 66.

*Secretary of a Department* — *Act of, presumed to be done by Direction of President.*

See EXECUTIVE DEPARTMENTS, 3, 4.

*Shareholder* — *When one is presumed to be.*

See CORPORATION — SHARES, 16.

*State presumed to recognize the Fourteenth Amendment as binding.*

See CIVIL RIGHTS, 4, 5.

*Substantive Fact not found, but supported by Evidence, not presumed.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 390.

*Sufficiency of Cause for striking out Sufficient Answer.*

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*Sureties in Administration Bond* — *Presumption against.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 71.

*Surrender of Notes that have been paid* — *Presumed.*

See VENDOR AND PURCHASER — IN GENERAL, 12.

*Surrender of Tenancy* — *When presumed.*

See LANDLORD AND TENANT, 36.

*That Things remain as they were.*

See FEDERAL COURTS — JURISDICTION, 26.

*Title presumed from Long Possession* — *Lands held under Spanish Grant in Louisiana* — *Forty Years.*

See LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS, 215.

*Usury not to be presumed.*

See USURY, 33, 35.

*Verdict* — *Presumption after.*

See PLEADING — AIDED BY VERDICT, 2 *et seq.*

*Waiver of Lien for Purchase-money* — *Note therefor.*

See VENDOR AND PURCHASER — VENDOR'S LIEN, 9.

*Will of Personalty supposed to speak according to Law of Domicile.*

See DEVISE AND LEGACY, 7.

*Withholding Evidence* — *Presumption therefrom.*

See DUTIES — PENALTIES AND FORFEITURES, 57.

**PRIMARY EVIDENCE** — *What constitutes, etc.*

See EVIDENCE — PRIMARY AND SECONDARY.

**PRINCIPAL AND AGENT** — *In general.*

See AGENCY.

**PRINCIPAL AND SURETY** — *In general.*

See SURETSHIP.

**PRIORITY** — *Invention* — *In general.*

See PATENT.

*Mortgages* — *In general* — *As against other Liens.*

See RAILROAD — MORTGAGE, 33 *et seq.*

*Payment* — *In general.*

See PAYMENT.

**PRISONER OF WAR** — *Who is* — *Resident of Loyal State.*

See WAR, 24.

**PRIVATEER** — *Construction and Proof of Commission* — *What is Breach of Owner's Bond* — *Collusive Capture* — *Validity of Capture.*] The commission of a privateer is qualified and limited by the act under which it issued, and subject to lawful instructions of the president. *The Thomas Gibbons*, 8 Cranch, 421.

2. If a privateer cruising under a commission from a government not acknowledged by the United States be lost after making a capture, the previous existence of the commission may be proved by parol. *The Estrella*, 4 Wheat. 298.

3. Although the seal to the commission of a government not acknowledged by the government of the United States cannot prove itself, yet, that the vessel cruising under the commission is employed by such government may be proved by other evidence, without proof of the seal. *Ib.*

4. A collusive capture and a violation of the revenue laws by a privateer are a breach of the condition of the owner's bond given under the act of June 26, 1812, § 3 (2 Sts. 759). *Greeley v. United States*, 8 Wheat. 257.

5. Every case of alleged collusive capture is to be tried on its own circumstances, but it is a circumstance to be noticed that the captor made another capture on the same cruise which has been pronounced collusive. *The Experiment*, 8 Wheat. 261.

6. Although the commission of a privateer is not avoided by the making of a collusive capture, the captor acquires no title to the prize. *Ib.*

7. The fact that a privateer is commanded by an alien enemy does not invalidate her captures. *The Mary and Susan*, 1 Wheat. 46.

8. A commission issued by the "brigadier" of an unknown and unacknowledged republic, or the "generalissimo" of a province of a foreign power, does not authorize an armed vessel to make captures at sea. *United States v. Klinton*, 5 Wheat. 144.

*Augmentation of Force* — *What constitutes.*

See NEUTRALITY, 2.



**PRIVATEER — continued.**

*Captures — Jurisdiction.*

See PRIZE — JURISDICTION, 5, 6.

*Commission to Cruise under Spanish Treaty of 1795.*

See TREATY, 31.

*Illegal Equipment — Capture — Restitution.*

See CAPTURE — RESTITUTION, 1.

*Owners responsible for Acts of Officers and Crew.*

See CAPTURE — CAPTOR'S DUTIES, ETC., 7, 13.

*Repairs in Foreign Port — Right to make.*

See TREATY, 13.

**PRIVATEERING — Jurisdiction in Equity — Action on Bond.**

See EQUITY — JURISDICTION, 26.

**PRIVILEGE — Members of Congress — Constitution — Speech or Debate.**

See CONGRESS, 24.

*Privileges and Immunities of Citizenship — Application of Constitutional Provisions respecting.*

See CITIZEN, 6 *et seq.*

**PRIVILEGED COMMUNICATION — What constitutes — When actionable — Malice, etc.**

See LIBEL AND SLANDER.

**PRIVITY — Contract — In general.**

See CONTRACT — WHAT CONSTITUTES, 23 *et seq.*; SPECIFIC PERFORMANCE, 29.

*Contract — No Privity between Bank and Payee of Check.*

See CHECK, 6.

*Estate — Devisee to Uses and Cestui que Use.*

See TRUST — CREATION AND CONSTRUCTION, 13.

*Who are Privies.*

See JUDGMENT — CONCLUSIVENESS, 117.

**PRIZE — Jurisdiction in Prize Matters.**

See PRIZE — JURISDICTION.

*Practice in Prize Matters.*

See PRIZE — PRACTICE.

**PRIZE — JURISDICTION — What Courts have Jurisdiction — Courts of what Power — Jurisdiction in what Cases.]** A decree in a prize cause, rendered by the "court of appeals in cases of capture" established under the articles of confederation, not having been executed, it was held that the district court had jurisdiction of a libel to enforce it. *Penhallow v. Doane*, 3 Dal. 54; *Jennings v. Carson*, 4 Cranch, 2.

2. Where an appeal in a prize cause from the highest court of New Hampshire to congress, taken before the establishment of the "court of appeals in cases of capture" under the articles

**PRIZE — JURISDICTION — continued.**

of confederation, was referred to the commissioners of appeal, and, after such establishment, was heard and adjudicated by the court of appeals, it was held that the decree was *coram judice* and binding. *Penhallow v. Doane*, 3 Dal. 54.

3. The court of appeals in prize causes established by the continental congress had power to reverse the sentence of a state court of admiralty. *United States v. Peters*, 5 Cranch, 115.

4. Where a captured vessel is abandoned at sea by the captor, and, being thus derelict, is taken possession of by a neutral and brought into a neutral port and libelled for salvage, the district court has jurisdiction of the libel, and may proceed to adjudicate on the claims of captors and owners to the surplus. *McDonough v. Dannery*, 3 Dal. 188.

5. The exclusive cognizance of prize questions belongs in general to the capturing power. If, therefore, one of our privateers recapture, bring in, and libel a duly commissioned privateer of a neutral power, the court cannot entertain jurisdiction of a claim against her for a tortious capture of an American vessel, although that vessel be no longer in the captor's possession, and therefore not to be proceeded against in the captor's courts. *L'Invincible*, 1 Wheat. 238.

6. But the court will take jurisdiction, to inquire if the privateer be duly commissioned, or if she have violated our neutral rights by using our territory to increase her force. *Ib.*

7. Although the exclusive cognizance of prize questions belongs, in general, to the capturing power, yet if the capture be brought *infra præsidia* of a neutral power, that power may inquire whether its neutrality has been violated, and, if it has been, it must restore the property. *The Estrella*, 4 Wheat. 298; *The Santissima Trinidad*, 7 Wheat. 283.

8. Although property captured by a vessel fitted out in violation of our neutrality may be condemned by the belligerent's court of prize, while in one of our ports, if still in the possession of the captor; yet, if the property has been arrested by process issuing out of our court, and the possession of the captor thus divested, a condemnation will not be valid. *The Santissima Trinidad*, 7 Wheat. 283.

9. A court of the capturing power may proceed to adjudicate and condemn without possession of the captured property, where distance and the weakness of the captor's force excuses him from sending it in. *Jecker v. Montgomery*, 18 How. 110.

10. Neither the president nor any inferior executive officer has any power to establish a court of prize competent to take jurisdiction of a case of capture *jure belli*. *Jecker v. Montgomery*, 13 How. 498.

11. The district court has no jurisdiction of a libel against a privateer commissioned by a foreign belligerent power for damages for the capture of

**PRIZE — JURISDICTION — continued.**

an American vessel as prize, such vessel not being within the United States, but *infra præsidia* of the captor. *United States v. Peters*, 3 Dal. 121.

12. Property captured as prize of war is not attachable at the suit of a private party. Any demand against it, as, *e. g.*, a demand for work and materials, supported by the usual maritime lien, must be considered and adjusted in the prize court. *The Nassau*, 4 Wal. 634.

13. The jurisdiction of a court of admiralty over a vessel captured *jure belli* is determined by the fact of capture: the filing of a libel is not necessary to create it. *Ib.*

14. A district court, sitting as a court of prize, may hear and determine all questions respecting claims arising after the capture of the vessel. *The Siren*, 7 Wal. 152.

15. Cases of recapture are cases of prize, and to be proceeded in as such; and restitution is to be made absolutely, or conditionally, or refused, as the case requires. *The Adeline*, 9 Cranch, 244.

*Supreme Court Jurisdiction appellate only.*

See SUPREME COURT — JURISDICTION, 34.

**PRIZE — PRACTICE — In general — Authority of English Prize Law — Parties — Pleading — Test Affidavit — Questions open — Postponement — Sentence — Distribution — Custody and Sale of Property — Liability of Prize Agent, etc.**

See pl. 1-28.

*Practice as to Evidence, in general — What justifies Condemnation — Presumptions — Burden of Proof.*

See pl. 29-51.

*Further Proof, when allowed.*

See pl. 52-73.

*Agreements in Prize Court made under Mistake, set aside.*

See pl. 74.

1. — *In general — Authority of English Prize Law — Parties — Pleading — Test Affidavit — Questions open — Postponement — Sentence — Distribution — Custody and Sale of Property — Liability of Prize Agent, etc.* The prize law of Great Britain having been ours before our separation from her, and having remained ours so far as adapted to our condition and so far as not varied by any competent power, decisions of prize questions in that country, although not of authority, will be received with respect, and, if decided on ancient principles, will not be entirely disregarded, unless very unreasonable, or founded on constructions elsewhere rejected. *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191.

2. Although, in general, proceedings for condemnation as prize should be in the name of the United States, a decree in a cause conducted in the name of the captor will not be reversed after a long litigation without objection on that

**PRIZE — PRACTICE — continued.**

score before the argument in the supreme court. *Jecker v. Montgomery*, 18 How. 110.

3. A libel in prize is sufficient if it allege, generally, a capture as prize of war, without alleging the cause of seizure. *The Andromeda*, 2 Wal. 481.

4. Forfeiture of the property precludes the owner from appearing as a claimant in a prize proceeding, although no steps have been taken to enforce the forfeiture. *The Venus*, 8 Cranch, 253.

5. The holder of a bottomry bond cannot claim in a prize cause. *The Mary*, 9 Cranch, 126.

6. If the principal is without the country, or at a great distance from the court, the claim and affidavit may be made by an agent. *The Adeline*, 9 Cranch, 244.

7. The test affidavit should state that the property at the time of shipment and capture did belong, and, if restored, would belong, to the claimant. *Ib.*

8. Whether the captor was duly commissioned is a question which the claimant cannot raise, it being a question only between the captor and the government. *The Dos Hermanos*, 2 Wheat. 76; *The Amiable Isabella*, 6 Wheat. 1.

9. Statement of the course of proceedings where the captor has improperly made sale of the prize, or neglected, or unreasonably delayed, to submit the question of prize or no prize to the proper court. *Jecker v. Montgomery*, 13 How. 498.

10. If the character of captured property appear to be ambiguous or neutral, and no claim be interposed, the cause will be postponed for a year and a day; and if no claimant appear, the property will then be condemned. *The Harrison*, 1 Wheat. 298.

11. Condemnation subject to appeal is not final, and therefore not definitive within the meaning of the treaty of the United States with France of December 21, 1801. *The Peggy*, 1 Cranch, 103.

12. A sentence of condemnation as prize does not establish any particular fact, without which the sentence may have been rightly pronounced. Thus, it is not conclusive of the question whether the legal title was in a neutral. *Maley v. Shattuck*, 3 Cranch, 458.

13. The rule of the law of nations that a sentence of condemnation divests the title of the original owner and vests it in the captor or his sovereign, which was also the rule under the salvage act of March 3, 1800 (2 Sts. 16), was unchanged by the act of June 26, 1812, § 5 (2 Sts. 760). Thus, under those acts a citizen's vessel captured by the enemy and condemned, and afterwards captured from the enemy by an American privateer, was not restored to the original owner on payment of salvage, but condemned as enemy's property. *The Star*, 3 Wheat. 78.

14. The sentence of condemnation relates to the capture, and affirms a sale made by the captor before condemnation. *Williams v. Armroyd*, 7 Cranch, 423.

**PRIZE — PRACTICE — continued.**

15. Condemnation of the vessel as enemy's property for want of claim will not estop the claimant of the cargo from proving in the same cause that she was in fact not enemy's property. *The Mary*, 9 Cranch, 126.

16. Whoever claims under a condemnation as prize, must show that he is a *bona fide* purchaser for a valuable consideration, unaffected by participation in the violation of our neutrality by the captors. *La Nereyda*, 8 Wheat. 108.

17. A prize court cannot award a percentage of prize-money to an agent whom the captors have appointed, and to whom they have bound themselves to pay such percentage, and requested "the proper officers of government" to pay the same before paying over the prize-money for distribution, but will turn him over to the officers intrusted with the distribution. *The Atlanta*, 3 Wal. 425.

18. In determining, for the purposes of the distribution of prize-money, under the act of July 17, 1862 (12 Sts. 600), whether the captured vessel was of a force equal or superior to that of the captors, it is proper to consider as a part of that force a vessel which, although not actually fully engaged, may by its position, conduct, and apparent purpose to come at once into action, have hastened the surrender. *Ib.*

19. An award allowing to captors of certain vessels their value as prize, and in addition a percentage of their value as salvage, is erroneous. *United States v. Farragut*, 22 Wal. 406.

20. The sentence of a competent foreign prize court, although avowedly contrary to the law of nations, is valid here because not examinable in our courts. *Williams v. Arnroyd*, 7 Cranch, 423.

21. A vessel libelled as prize is in the custody of the law, and under control of the court. *Jennings v. Carson*, 4 Cranch, 2.

22. A prize court in which the proceedings were instituted has power to order a sale, even after an appeal. *Ib.*

23. Where a decree condemning a vessel as prize also ordered a sale, and an appeal was taken, it was held that although it was irregular to sell on that decree, the irregularity would not render the captor liable for the proceeds of the sale, which came not into his hands, but were under control of the court. *Ib.*

24. Under the act of March 3, 1849 (9 Sts. 378), the proceeds of a prize should be deposited in the treasury. *Jecker v. Montgomery*, 18 How. 110.

25. A prize agent who pays over to the captor the proceeds of the sale of a prize, without an order of court, is responsible to the owner, if restitution be decreed, for the net amount he received. *Hills v. Ross*, 3 Dal. 331.

26. A prayer for general relief in a libel brought in a district court of the United States to procure the enforcement of a decree in a prize cause rendered by the "court of appeals in cases

**PRIZE — PRACTICE — continued.**

of capture" established under the articles of confederation, held to allow a recovery of damages for not executing the decree. *Penhallow v. Doane*, 3 Dal. 54.

27. If a capture be made by a non-commissioned captor, the government may contest the right of the captor after condemnation and before distribution. *The Amiable Isabella*, 6 Wheat. 1.

28. *Semble*, that papers found on board a vessel collusively captured may be invoked in a case of libel by the captor of another vessel captured in like manner on the same cruise. *The Experiment*, 8 Wheat. 261.

29. — *Practice as to Evidence, in general — What justifies Condemnation — Presumptions — Burden of Proof.* In prize causes, the evidence to acquit or condemn must come in the first instance from the papers and crew of the captured vessel. *The Dos Hermanos*, 2 Wheat. 76; *The Amiable Isabella*, 6 Wheat. 1; *The Sally Magee*, 3 Wal. 451; *The Sir William Peel*, 5 Wal. 517.

30. If from the ship's papers and the examination on the standing interrogatories the property clearly appear to be hostile or neutral, condemnation or restitution immediately follows. *The Dos Hermanos*, 2 Wheat. 76.

31. Concealment or spoliation of papers, although calculated to excite suspicion, is not *per se* sufficient ground for condemnation, but is open to explanation. *The Pizarro*, 2 Wheat. 227; *The Peterhoff*, 5 Wal. 28.

32. Spoliation of papers at the time of capture, under instructions and without explanation by production of the instructions or otherwise, warrants the most unfavorable inferences as to employment, destination, and ownership of the captured vessel. *The Bermuda*, 3 Wal. 514.

33. The assertion of a claim false in whole or in part, in connivance with the owner, or by his agent, is ground for condemnation. *The Amiable Isabella*, 6 Wheat. 1.

34. The selecting of a master, the controlling of the lading, the giving of instructions for the voyage and as to the destination, and other like acts of ownership by an enemy, in the absence of charter-party or other explanation, may repel a presumption of neutral ownership arising from registry or other documents, and warrant the condemnation of a vessel captured in the employment of an enemy as enemy property. *The Bermuda*, 3 Wal. 514.

35. The possession of neutral muniments, however regular and formal, if colorable only, does not affect belligerent rights. *The Rugen*, 1 Wheat. 61.

36. The commission of a public vessel, signed by the proper authorities, is conclusive of her national character. *The Santissima Trinidad*, 7 Wheat. 283.

37. If in cases of alleged joint or collusive capture there be any doubt, evidence other than that arising from the captured vessel or invoked

**PRIZE — PRACTICE — continued.**

from other prize causes may be resorted to. *The George*, 1 Wheat. 408.

38. What evidence is sufficient to prove that the property captured is enemy's property. *The Andromeda*, 2 Wal. 481; *The Sally Magee*, 3 Wal. 451; *The Bermuda*, 3 Wal. 514.

39. What is not sufficient. *The Wren*, 6 Wal. 582.

40. In general, the finding of goods on an enemy's vessel, bound to one of the enemy's ports, raises a presumption that they are enemy's property. *The London Packet*, 5 Wheat. 132.

41. In a prize court, the burden of proving a neutral interest rests on the claimant. *The Amiable Isabella*, 6 Wheat. 1; *The Jenny*, 5 Wal. 183.

42. Whoever sets up title under a decree of condemnation as prize must prove that the decree was pronounced by a court having jurisdiction for that purpose. *La Nereyda*, 8 Wheat. 108.

43. And in case of a decree of a court foreign to the captors, it must appear that the jurisdiction was invoked by them. *Ib.*

44. The examination of the captured crew must be taken on standing interrogatories, and not *risa voce*. *The Pizarro*, 3 Wheat. 327.

45. If, preparatory to the first hearing, testimony of persons in no way connected with the vessel be taken, it should be excluded. *The Sir William Peel*, 5 Wal. 517.

46. If a transfer of the capturing vessel in the port of a belligerent under whose flag she sails, be alleged to justify the capture, the transfer must be proved by bill of sale or direct and positive evidence. *La Concepcion*, 6 Wheat. 235. And see *The Monte Allegre*, 7 Wheat. 520.

47. Ownership of cargo by an enemy, presumed from consignment in bill of lading, may be disproved by proof of purchase by the consignor in contravention of orders and subsequent rejection by the consignee; but a test affidavit by an alleged agent of the consignor to such effect, referring to correspondence of parties, but not producing it nor accounting for its absence, will not suffice, where the cause has been pending two years and the consignor has shown no interest in the proceedings, and, so far as appears, has never been applied to in the matter. *The Sally Magee*, 3 Wal. 451.

48. A lien on enemy's property set up under the act of March 3, 1863 (12 Sts. 762), protecting liens of loyal citizens on rebel property, must be affirmatively made out; and the test oath of the claimant thereof, founded on correspondence and copies of the invoice, sworn to as "believed to be true," the correspondence and copies not being produced, and their absence not being accounted for, will not suffice. *Ib.*

49. If the owner of captured property seek restitution in our courts on the ground of violation of our neutrality by the captor, the burden of proving such violation is on him. *La Amistad de Rues*, 5 Wheat. 385.

**PRIZE — PRACTICE — continued.**

50. If restitution of a capture be claimed on the ground of illegal augmentation of the captor's force by the enlistment of men within the United States, the burden of proving the enlistment is on the claimant. *The Estrella*, 4 Wheat. 298.

51. But, enlistment being proved, it is for the captor to prove that the persons enlisted were subjects of the state under whose flag the cruiser sailed, transiently within the United States, to bring the case within the saving provision of the statutes. *Ib.*; *The Santissima Trinidad*, 7 Wheat. 283.

52. — *Further Proof, when allowed*.] The court will order further proof, where it does not distinctly appear whether enough has been done to amount to a capture. *The Grotius*, 8 Cranch, 456.

53. So, if the character of the property appear to be doubtful, or the case suspicious. *The Dos Hermanos*, 2 Wheat. 76; *The Amiable Isabella*, 6 Wheat. 1; *The Sally Magee*, 3 Wal. 451; *The Sir William Peel*, 5 Wal. 517.

54. Either on motion and further grounds shown, or by the court acting on its own motion. *The Sir William Peel*, 5 Wal. 517.

55. A bill of lading, consigning the goods to a neutral, unaccompanied by an invoice or letter of advice, although insufficient to entitle the claimant to restitution, will lay a foundation for the introduction of further proof. *The Friendship*, 3 Wheat. 14.

56. If the claimants have been guilty of gross fraud, misconduct, or illegality, further proof will not be allowed. *The Dos Hermanos*, 2 Wheat. 76.

57. Nor where there is reason to believe that the applicant has suppressed important documentary evidence. In such case, the court will proceed to condemnation. *The St. Lawrence*, 8 Cranch, 434.

58. But otherwise where the documents not produced below are produced in the supreme court in support of the application, and appear to support the applicant's title, and do not appear to have been kept back unfairly. *Ib.*

59. An order, on appeal, for further proof inconsistent with that already in the case, refused. *The Euphrates*, 8 Cranch, 385.

60. A claimant's right to an order for further proof is forfeited by any previous guilty concealments in the case. *The Gray Jacket*, 5 Wal. 342.

61. A neutral claimant to whom no fraud is imputable will not be precluded from further proof by suspicion, nor, it seems, by proof of spoliation of papers by the enemy master, carrying a cargo chiefly hostile. *The Friendship*, 3 Wheat. 14.

62. Parties may apply for an order for further proof, and not wait for the court to make it *sua sponte*. *The Sally Magee*, 3 Wal. 451.

63. Further proofs will not be stricken out on appeal because the record discloses no order therefor, where it is apparent, as, e. g., from parties having joined in taking them, either that

**PRIZE — PRACTICE — continued.**

there was an order, or that the proofs were taken by consent. *The Georgia*, 7 Wal. 32.

64. A second order for further proof may be made where the affidavits produced on the order for further proof are positive, but their credibility is impaired by the non-production of letters therein mentioned. *The Frances*, 8 Cranch, 348.

65. The captors are competent witnesses on an order for further proof, where the order extends to both parties. *The Anne*, 3 Wheat. 435.

66. In the supreme court, prize causes are first heard on the evidence transmitted from the circuit court, and the court will determine therefrom whether to allow further proof. *The London Packet*, 2 Wheat. 371.

67. Further proof allowed. *The Mary*, 8 Cranch, 338; *The Grotius*, Id. 456; *The Hazard's Cargo v. Campbell*, 9 Cranch, 205; *The Adeline*, 9 Cranch, 244; *The Samuel*, 1 Wheat. 9; *The Venus*, 1 Wheat. 112; *The George*, 1 Wheat. 403; *The Elsinour*, 1 Wheat. 439; *The Fortuna*, 2 Wheat. 161; *The Pizarro*, 2 Wheat. 227; *The London Packet*, 2 Wheat. 371; *The Freundschaft*, 3 Wheat. 14; *The Fortuna*, 3 Wheat. 236; *The Atalanta*, 3 Wheat. 409.

68. Not allowed. *The St. Lawrence*, 8 Cranch, 434; *The Dos Hermanos*, 2 Wheat. 76; *The Gray Jacket*, 5 Wal. 342.

69. Affidavits, to be used as further proof in prize cases in the supreme court, must be taken under a commission. *The London Packet*, 2 Wheat. 371.

70. Depositions taken as further proof in one prize cause cannot be used in another. *The Experiment*, 4 Wheat. 84.

71. Neglect of a claimant to comply with an order for further proof is, in general, fatal to his claim. *La Nereyda*, 8 Wheat. 108.

72. The failure of a claimant who set up title under a decree of condemnation as prize to produce a copy of the proceedings on which the condemnation was pronounced, on an order for further proof, held, in the circumstances, his conduct being inconsistent with his asserted proprietary interest, to justify the rejection of his claim. *Ib.*

73. If, on the production of further proof, the neutrality of the property be not established beyond reasonable doubt, condemnation will follow. *The Amiable Isabella*, 6 Wheat. 1.

74. — *Agreements in Prize Court made under Mistake, set aside.* An agreement in a prize court, like an agreement in a common-law court or a court of chancery, made under a clear mistake, will be set aside. *The Hiram*, 1 Wheat. 440.

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**PROBATE COURT** — *Jurisdiction* — *What it includes* — *Power of the Court in Mississippi.* Jurisdiction of all probate and testamentary matters does not necessarily include power to license an administrator to sell land for the payment of debts. *Hamilton Bank v. Dudley*, 2 Pet. 492.

2. In Mississippi, under the statute of 1833, the judge of probate has authority to appoint a clerk *pro tempore* to act, not merely during the term at which the appointment is made, but in vacation during the temporary disability of the clerk. *Cocke v. Halsey*, 16 Pet. 71.

3. The decision of the judge on the exigency is final. *Ib.*

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**PROCEEDING IN REM** — *What constitutes.* A proceeding may be one in *rem*, although begun by the mere bringing of a suit without actual seizure; and although not concluding all the world, but only those within the jurisdiction. *Heidrüter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294.

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**PROHIBITION** — *When the Supreme Court may issue the Writ* — *To what Courts it may issue, and for what Purpose* — *Form of the Writ.* The supreme court cannot issue a writ of prohibition where it has no appellate power, and no special authority. Thus, it can issue none to a circuit court in a criminal case. *Ex parte Gordon*, 1 Black, 503.

2. It has no power to issue a writ of prohibition to a district court sitting in bankruptcy. *Ex parte Christy*, 3 How. 292.

3. Nor to a circuit court in a proceeding under act of May 31, 1870, § 23 (16 Sts. 140), to enforce the rights of citizens of the United States to vote in the several states, until an appeal is taken from a final decree therein. *Ex parte Warmouth*, 17 Wal. 64.

4. The supreme court will grant a writ of prohibition upon a judge of the district court who is proceeding in a cause of which the district court

**PROHIBITION — continued.**

has no jurisdiction. *United States v. Peters*, 3 Dal. 121.

5. On motion for a writ of prohibition against the district court, the writ was withheld, although the court was satisfied that that court was proceeding without authority of law, the litigation being difficult and complicated, and the court not doubting that that court needed but to be advised to conform to the opinion expressed. [CATRON, J., dissenting.] *Bronson v. La Crosse & Milwaukee Railroad Co.*, 1 Wal. 405.

6. Proceedings under the confiscation act of July 17, 1862 (12 Sts. 539), are not proceedings in admiralty, although the act declares that they "shall be *in rem*, and conform as near as may be to proceedings in admiralty; and hence a writ of prohibition will not lie to a district court in such case, the writ being confined to cases in which the court is proceeding as a court of admiralty. *Ex parte Graham*, 10 Wal. 541.

7. Whether the supreme court can issue a writ of prohibition to a district court proceeding as a court of "admiralty and maritime jurisdiction," depends on the facts shown by the record on which that court is called to act, and on nothing *dehors*. *Ex parte Easton*, 95 U. S. 68.

8. A writ of prohibition will not lie to correct a supposed error in a judgment of an admiralty court on the merits of a suit. The remedy, if any, is by appeal. If there is no right of appeal, the parties are concluded. *Ex parte Pennsylvania*, 109 U. S. 174.

9. A district court having jurisdiction of a libel growing out of a collision will not be restrained by prohibition from determining whether the vessel is liable for damages resulting from a loss of life. *Ex parte Gordon*, 104 U. S. 515.

10. Nor will the writ issue although the damages claimed are so small that no appeal can be taken to the supreme court. *Ex parte Detroit River Ferry Co.*, 104 U. S. 519.

11. Claims for pilots' fees are within the jurisdiction of the district court sitting in admiralty; and that court will not be restrained by writ of prohibition from proceeding in a suit to recover such fees. *Ex parte Hagar*, 104 U. S. 520.

12. The writ of prohibition can be used only to prevent the doing of some act which is about to be done, and not as a remedy for acts already completed. *United States v. Hoffman*, 4 Wal. 158.

13. Form of writ of prohibition. *United States v. Peters*, 3 Dal. 121.

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**PROPERTY — What constitutes — Real Property.]**

An inchoate title to land under a state military reservation, held to be in its nature real property. *Kerr v. Moon*, 9 Wheat. 565.

2. One who lends to a city cannot be said to be a holder of property within its limits merely because he holds as evidence of the debt certificates of stock in the city, whereby the city promises to pay the sums named. *Murray v. Charleston*, 96 U. S. 432.

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**PROVISIONAL COURTS** — *Power of the President to establish — Decrees — Powers.*] The president, as commander-in-chief, has power, during civil war, to establish provisional courts of justice in insurgent territory occupied by the federal forces. *The Grapeshot*, 9 Wal. 129; *Mechanics' & Traders' Bank v. Union Bank*, 22 Wal. 276.

2. A decree of the provisional court of Louisiana, established by order of the president, during the rebellion, having been transferred into the circuit court pursuant to act of congress, is to be deemed, as regards appeal, as a decree of the circuit court. *The Grapeshot*, 7 Wal. 563.

3. The provisional court of Louisiana, established by executive order October 20, 1862, did not cease to exist until July 28, 1866, the date of the enactment (14 Sts. 344), whereby the transfer of its pending cases, judgments, and decrees to the federal courts was provided for. *Burke v. Millenberger*, 19 Wal. 519.

4. The powers of temporary courts set up in a conquered territory do not necessarily terminate on the cessation of hostilities, if the conqueror retain the sovereignty. *Leitensdorfer v. Webb*, 20 How. 176.

*Conqueror may set up.*

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**PROVISIONAL GOVERNMENT** — *Power — To revoke Appointment of Judge — To set aside Decree of Court — Continuance.*] The appointment of a judge by a military governor of a state in time of civil war is revocable at the discretion of such governor; and when the civil government comes into operation independent of military control, the authority derived from such appointment ceases, and the office becomes vacant. *Handlin v. Wickliffe*, 12 Wal. 173.

2. Nothing in the act of March 2, 1867 (14 Sts. 428), nor in the act of July 19, 1867 (15 Sts. 14), defining the duties of military officers in command of the several states then lately in rebellion, authorized a commanding officer wholly to annul a decree rendered by a court of chancery in a case within its jurisdiction. *Raymond v. Thomas*, 91 U. S. 712.

3. A military government erected by the president as commander-in-chief in a conquered territory may lawfully continue after a treaty of cession, and until the establishment of a civil government by congress. *Cross v. Harrison*, 16 How. 164.

**PROVISIONAL GOVERNMENT** — *continued.*

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**QUI TAM** — *Action under Federal Statute does not survive.*

See **ACTION**, 19.

**QUIA TIMET** — *Where Bill lies.*] Where the income of property is devised in trust primarily for a particular charity, the surplus, if any, for others, the heirs-at-law cannot maintain a bill in the nature of a bill *quia timet* to have the possible future surplus appropriated to themselves, on the ground merely of anticipated difficulty in its precise administration and of expectation of its consequent perversion, no surplus having arisen, nor any prospect of any. *Girard v. Philadelphia*, 7 Wal. 1.

**QUIET ENJOYMENT** — *Covenant therefor — In general.*

See **COVENANT** — **IN GENERAL**; **LANDLORD AND TENANT**.

**QUIETING TITLE** — *When Bill will or will not lie — Various Cases.*] A court of equity will interpose in a clear case to quiet title. *Alexander v. Pendleton*, 8 Cranch, 462.

2. Where the right and matter in question have been fairly settled by concurring verdicts, a court of equity will grant a perpetual injunction for the quieting of a title. *Wickliffe v. Owings*, 17 How. 47.

3. The Kentucky statute on this subject is not without influence on a question as to the propriety of the application of that remedy by the federal courts to cases arising in that state. *Ib.*

4. He only who has a clear legal and equitable title accompanied by possession can maintain a bill of peace. Thus, the court cannot quiet title in favor of one who has taken an assignment of a secret equity for a nominal consideration and voluntarily purchased the legal title, knowing it to be in litigation in another court. *Orton v. Smith*, 18 How. 263.

5. A bill may be maintained as a bill to quiet title, or to remove a cloud, or as preventing a multiplicity of suits, although the complainant has a legal title. *Crews v. Burcham*, 1 Black, 352.

6. Where an execution issued from a district court on a decree in admiralty has been levied on real estate, the execution creditor may maintain a bill to ascertain and remove an incumbrance consisting of an unfounded claim under another lien which is an impediment to a fair sale of the land, as in case of execution at common law. *Ward v. Chamberlain*, 2 Black, 430.

7. Under the Oregon statute which provides that "any person in possession" of real property may maintain a bill against an adverse claimant to quiet the title, a bill will not lie on mere possession, without some right, legal or equitable, first shown. *Stark v. Starr*, 6 Wal. 403.

**QUIETING TITLE** — *continued.*

8. Proceedings void on their face constitute no cloud upon title which equity will interfere to remove. *Hannewinkle v. Georgetown*, 15 Wal. 547.

9. Where the existence of an invalid land patent creates a cloud on the title of the real owner, and embarrasses the assertion of his rights, its existence is ground for equitable relief. *Van Wyck v. Knevals*, 106 U. S. 360.

10. One claiming land under a deed from a person who has been discharged in bankruptcy, and against whose estate, which has been settled by the assignee, no debts were proven, has an equitable title sufficient to enable him to maintain a suit in equity to quiet it, in a state where, as in Indiana, such a suit may be brought, regardless of possession, against one claiming adversely. *Reynolds v. Craufordsville First National Bank*, 112 U. S. 405.

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See CIRCUIT COURT — JURISDICTION, 15.

**QUO WARRANTO** — *Nature of the Proceeding —*

*At whose Instance and in what Name maintained in Certain Cases.*] A proceeding for the removal of one from office by information in the nature of *quo warranto* in Kansas is a civil, not a criminal, proceeding. *Ames v. Kansas*, 111 U. S. 449; *Foster v. Kansas*, 112 U. S. 201.

2. An information for a *quo warranto* to try the title to an office can be maintained only at the instance of the government, although parties consent. *Wallace v. Anderson*, 5 Wheat. 291.

3. A proceeding in the nature of a *quo warranto*, in one of the territories, to test the right of a person to exercise the functions of a judge of the supreme court of the territory, must be in the name of the United States; if in that of the territory, a demurrer will lie. *Nebraska v. Lockwood*, 3 Wal. 236.

*Actions under Statute where Quo Warranto was appropriate — Civil Suit.*

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## R.

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See pl. 21-25.

*Rights and Powers — Sales, Leases, etc. — Guaranty of Bonds — Exemption from Taxation.*

See pl. 26-41.

1. — *What constitutes — Corporations of other States.*] A corporation which, under its charter, has the right to construct a railroad, and which accordingly does so, may be deemed a railroad company for the purposes of taxation on its bonds under the act of July 13, 1866 (14 Sts. 138). [WAITE, C. J., and FIELD and HARLAN, JJ., dissenting, holding the corporation in question to be a mining company, and its railroad to be merely incidental to its business of mining, although it carried freight and passengers for hire, in addition to doing its own business.] *Kentucky Improvement Co. v. Slack*, 100 U. S. 648; *Eastern Kentucky Railway Co. v. Slack*, Id. 659.

2. Where a railroad company whose charter contemplates an extension of the road beyond the limits of the state is, by statute of an adjoining state reciting the charter, given the same rights and subjected to the same liabilities there

**RAILROAD — COMPANY — continued.**

which by its charter it has in the state of its creation, there is, in the latter state, no creation of a new corporation, but merely a license to the one which already exists to come in and operate its road on the terms of the charter which it already has. *Baltimore & Ohio Railroad Co. v. Harris*, 13 Wal. 65.

3. Where the legislature, in confirming a lease made by a domestic to a foreign railroad corporation, declares that the latter shall be a corporation in the state, and shall possess the powers incident to other railroad corporations, it becomes a corporation of the state, although its stockholders and officers have taken no action save to manage and use the leased road and property. It cannot be claimed that the act confers a mere license to exercise corporate powers in the state. *Indianapolis & St. Louis Railroad Co. v. Vance*, 96 U. S. 450.

4. Where a railroad corporation chartered in a certain state bought the franchises and property of a railroad corporation created under the laws of that state and of a neighboring state, and the legislature of the latter state ratified the sale and authorized the purchaser to exercise the rights so acquired, the purchaser became the successor of the former company, and a corporation of the latter state. *Clark v. Barnard*, 108 U. S. 436.

5. — *Duties and Liabilities — Trains, Fires, Turn-tables, Fences.* The duties of railroad companies in running locomotives over crossings in cities and towns, and of persons crossing tracks in such places. *Chicago & Northwestern Railway Co. v. Whitton*, 13 Wal. 270.

6. Travellers on a highway crossing a railroad on the same level, and the railroad company running a train, have mutual and reciprocal duties and obligations; and although the train has the right of way, the same degree of care and diligence in avoiding a collision — the care and diligence, i. e., of an ordinarily prudent man — is required from each of them; and hence that right is accompanied with and conditioned upon the duty of the company to give due warning of the approach of a train. *Continental Improvement Co. v. Stead*, 95 U. S. 161.

7. One who attempts to cross a railroad track, neither listening nor looking for a train, cannot maintain an action against the company for personal injuries inflicted by a passing train, although no bell is rung or whistle sounded, such conduct being negligence. *Chicago, Rock Island, & Pacific Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Chicago, Milwaukee, & St. Paul Railway Co.*, 114 U. S. 615.

8. A statute which declares that railroad corporations shall be liable to persons injured by reason of a failure of the engine-man to ring the bell before a train crosses a highway, does not affect the application of the general rule of law exempting a corporation from liability to a servant for an injury caused by the negligence of a

**RAILROAD — COMPANY — continued.**

fellow-servant. *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478.

9. The provisions of the Tennessee code prescribing the precautions to be observed by railroad companies in running their trains have no application to contractors engaged in building a railroad. *Griggs v. Houston*, 104 U. S. 553.

10. A railroad company which grants the use of its road to another company is liable for injuries to its own passengers caused by negligence in the running of the trains of the other company. *Illinois Central Railroad Co. v. Barron*, 5 Wal. 90.

11. A railroad company whose road is operated on joint account of a receiver of part of the road and lessees of the remainder, is liable for injuries committed by a servant of the parties operating it in improperly expelling a passenger from a car, especially where the passenger is travelling on a ticket issued in the name of the company, and where, so far as appears, the passenger did not know that the road was not operated by the company. The contract is with the company, and, besides, the company having permitted the receiver and the lessees to operate the road as if there were no change of possession, is in no position to question its liability. *Washington, Alexandria, & Georgetown Railroad Co. v. Brown*, 17 Wal. 445.

12. Where a state statute provides that "when an injury is done to a building or other property by fires communicated by a locomotive engine of any railroad corporation," the corporation shall be liable and shall have an insurable interest in such property "along its route," liability may attach, although the property injured is within, as well as without, the roadway; and although it is burned by reason of the fire spreading from other buildings to which it was communicated from the engine. *Grand Trunk Railroad Co. v. Richardson*, 91 U. S. 454.

13. Although a railroad company is not bound to the same degree of care in regard to mere strangers unlawfully on its premises that it owes to passengers, it is not exempt from the ordinary liability to a trespasser for negligence; not exempt, for instance, from liability for negligence in leaving a turn-table unfastened so that children may play with it to their injury. *Sioux City & Pacific Railroad Co. v. Stout*, 17 Wal. 657.

14. Where a city, having authority to require railroad companies to "provide protection against injury to persons," grants a company a right of way along an open park, but provides that the company shall erect such suitable walls or fences as will secure persons from danger, proof of failure on the part of the company to comply with that provision is evidence of negligence, in an action for injury to a child who strayed on to the track at a point where, had there been compliance, a wall or fence would have been erected. *Hayes v. Michigan Central Railroad Co.*, 111 U. S. 228.

**RAILROAD — COMPANY — continued.**

15. — *Duties and Liabilities — Taxes, Use of Patents.*] A railroad company, lessor of a railroad in another state, and declared by statute of such state to be a corporation, may be there taxed as such, although it has merely operated the leased road. *Indianapolis & St. Louis Railroad Co. v. Vance*, 96 U. S. 450.

16. It follows that the leased property can be held liable for assessments on the capital stock and franchise of the corporation. *Ib.*

17. And this, whether the act be deemed to have created a new corporation, or merely to have made the existing corporation a corporation of the state. *Ib.*

18. A railroad corporation is liable in an action for infringement for the use of a patented improvement on cars run over its road, although it has but the form and appearance of corporate existence, and all its capital stock is owned, and its road is worked, by a corporation created by another state. *York & Maryland Line Railroad Co. v. Winans*, 17 How. 30.

19. In Louisiana, where one, in bad faith, obtains possession of a dilapidated railroad, he may be decreed compensation for his expenditures in putting it in working order, on its restoration to those who are entitled to it. Such a right is implied from the code of the state, from the decisions of its courts, and from the rule of the civil law. [FIELD, J., dissenting.] *Jackson v. Ludeling*, 99 U. S. 513.

20. But compensation must be limited to the value of the improvements when the property is delivered up, to the exclusion of such as have been consumed in use, with interest on the outlay not exceeding the fruits of the improvements, not as interest, but as an equivalent *pro tanto* to the fruits received. *Ib.*

21. — *Duties and Liabilities — Remedies — Where liable, and Liability, how shown.*] A railroad company, by its charter permitted to extend its road into another state, licensed by that state to come in and operate its road on the terms of its charter, must there answer for an injury done anywhere on its road. *Baltimore & Ohio Railroad Co. v. Harris*, 12 Wal. 65.

22. A question as to the sufficiency of the evidence to support the verdict in an action against a railroad company for negligence in leaving a turn-table unfastened so that the plaintiff, a child, in playing with it was injured, the turn-table being in an open space some distance from the depot, and in the neighborhood of several houses, — answered in the affirmative. *Sioux City & Pacific Railroad Co. v. Stout*, 17 Wal. 657.

23. On the trial of a suit against a railroad company to recover damages for buildings destroyed by fire alleged to have been communicated by an engine of the company, it may be shown that at other times other engines scattered fire at the same place. *Grand Trunk Railroad Co. v. Richardson*, 91 U. S. 454.

24. But not that other companies were ac-

**RAILROAD — COMPANY — continued.**

customed to employ watchmen in similar localities. *Ib.*

25. And where it appeared that the buildings were partly within the lines of the roadway, it was held that the plaintiff might show that the buildings were there under a license from the company; and that, even if they were not, the company was bound to use ordinary care to avoid injuring them. *Ib.*

26. — *Rights and Powers — Sales, Leases, etc.*] A railroad company having the right to construct a particular line of railroad, with general power to purchase all kinds of property, may purchase from another company a road constructed on that line, if the latter company have power to sell. *Branch v. Jesup*, 106 U. S. 468.

27. A corporation created to build a railroad has no power to buy steamboats to run in connection with its road; and an indorsee with notice of notes given on such a purchase cannot recover thereon. *Pearce v. Madison & Indianapolis Railroad Co.*, 21 How. 441.

28. A railroad corporation authorized by its charter to make such contracts as the management of its road and its interests require, and by general laws, to run its road in connection with other roads, to build and run steamboats, and to accept from other states privileges applicable to carriage by railway or steamboat in such states, may enter into a contract with the proprietors of steamboats running between its terminus and a point without the state relating to the carriage of freight and passengers in connection with its road, and guaranteeing to such proprietors that the gross earnings of each boat for a certain time shall amount to a certain sum. *Green Bay & Minnesota Railroad Co. v. Union Steamboat Co.*, 107 U. S. 98.

29. A lease by a railroad corporation of its road, rolling-stock, and franchises, the franchises and power of such a company being largely intended to be exercised by the company for the public good, is *ultra vires* and void, if executed without legislative authority. *Thomas v. West Jersey Railroad Co.*, 101 U. S. 71.

30. A provision in its charter that it may make contracts and engagements with other corporations or individuals for the transportation of goods, etc., confers no power to make such a lease. *Ib.*

31. Nor is such a lease ratified by a statute the purpose of which is to regulate rates, and which refers to "the directors of the company, its lessees or agents." *Ib.*

32. Where the charter of a railroad company grants the right to construct a road from "some point within" a city, to be approved by the city council, no point being fixed, the company acquires no vested right to use its locomotives in the public streets, on approval by the city of its passing through a certain street to lots purchased for shops and warehouses, on condition that it shall not be considered as parting with any power

**RAILROAD — COMPANY — continued.**

not necessary for constructing the road or connecting it with the warehouses, the city having all powers "necessary for the good ordering," etc., of persons and property. *Richmond, Fredericksburg, & Potomac Railroad Co. v. Richmond*, 96 U. S. 521.

33. A constitutional provision that all shall have equal rights to have persons and property transported over any railroad, that there shall be no undue nor unreasonable discrimination in charges or facilities, and that preferences shall not be given in furnishing cars or motive power, imposes no greater obligations than are imposed by the rule of the common law. *Atchison, Topeka, & Santa Fe Railroad Co. v. Denver & New Orleans Railroad Co.*, 110 U. S. 667.

34. Such a provision does not imply the right on the part of a railroad company to demand that another company shall stop its cars for the purpose of an exchange of business at a point of intersection where the latter company has not established a station, nor to demand that such company shall unite in forming a through line, nor to demand that it shall haul the cars of the former company, nor to demand that local rates shall be fixed, in the case of the latter company, on the basis governing through rates under an arrangement with a third company. *Ib.*

35. Nor is the right to demand these things implied from a provision that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad." *Ib.*

36. — *Rights and Powers — Guaranty of Bonds.*] The Ohio statutes of 1851 and 1852 authorizing railroad companies to aid other railroad companies by subscribing to their capital stock or otherwise, authorized a guaranty of their bonds. *Zabriske v. Cleveland, Columbus, & Cincinnati Railroad Co.*, 23 How. 381.

37. By the law of Iowa, a railroad company having power to issue bonds for the construction of its road, may guarantee the bonds of municipal corporations, taken in payment for stock, and used for the same purpose. *Chicago, Rock Island, & Pacific Railroad Co. v. Howard*, 7 Wal. 392.

38. — *Rights and Powers — Exemption from Taxation.*] Where "all the powers, rights, and privileges granted by the charter" of a certain railroad company are granted to another company, the second company thereby acquires an exemption from taxation already conferred on the former company, by "an act to amend the charter" thereof, such act being a part of the charter. *Humphrey v. Pegues*, 16 Wal. 244.

39. While in the case of the sale of "all the powers, rights, and privileges of a railroad company, the purchaser may claim the right of immunity from taxation as could the original company, the rule is otherwise if the sale be of the "property and franchises" only. *East Tennessee, Virginia, & Georgia Railroad Co. v. Hamblen County*, 102 U. S. 273.

**RAILROAD — COMPANY — continued.**

40. A statute which declares that a new corporation shall succeed to all the "franchises, rights, and privileges" of an old one, does not confer an exemption from taxation enjoyed by the old corporation. *Chesapeake & Ohio Railway Co. v. Miller*, 114 U. S. 176.

41. Where a corporation is dissolved, and purchasers of its property and franchises are incorporated, the new corporation is subject to existing laws, — to a law, for instance, reserving the right to alter or repeal any law applicable to corporations; and if the new corporation were exempt from taxation because of an exemption enjoyed by the old corporation, such exemption could be taken away by a subsequent statute. *Ib.*

**Amendment of Charter.**

See CORPORATION — CHARTER, 7, 11-13, 18.

**Bankruptcy — Company may be adjudged Bankrupt.**

See BANKRUPTCY — PARTNERSHIPS, ETC., 5.

**Brakeman using a Switch is a Fellow-servant of Engineer of another Train — Conductor of Train not Fellow-servant of Engineer.**

See MASTER AND SERVANT, 17, 19.

**Charter — Decisions of State Courts respecting Repeal, followed by Federal Courts.**

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 44, 45.

**Charter Provision that no other Road shall be allowed — Effect.**

See CORPORATION — CHARTER, 32.

**Construction — Aid thereto — When State may release Penalty due to County.**

See CORPORATION — CHARTER, 28.

**Contract for Grading — Breach.**

See CONTRACT — PERFORMANCE AND BREACH, 6.

**Contracts — In general.**

See CONTRACT — IMPAIRMENT OF OBLIGATION.

**Duties, etc., as Common Carrier.**

See CARRIER.

**Earnings in Hands of Receiver chargeable with Value of Goods lost and with Current Expenses.**

See RAILROAD — MORTGAGE, 51-53.

**Exemplary Damages for Personal Injury.**

See DAMAGES, 29.

**Telegraph Operators — Care necessary in selecting.**

See MASTER AND SERVANT, 12.

**Tracks in the Streets of a Town.**

See WATERS, 30.

**What constitutes.**

See MUNICIPAL CORPORATION — FISCAL POWERS, 82.

**RAILROAD — CONSOLIDATION — Right to consolidate — When it exists — What it includes.**

See pl. 1-3.

**Effect of Consolidation — In general — Effect on Exemption from Taxation.**

See pl. 4-15.

1. — **Right to consolidate — When it exists — What it includes.** Separate corporations created to build distinct lines of railroad have no right to unite as one company without legislative authority. *Pearce v. Madison & Indianapolis Railroad Co.*, 21 How. 441.

2. While, in general, a railroad company having only the ordinary power to construct and operate its road cannot dispose of it to another company, it is otherwise where it has express power to incorporate its stock with that of any other company. It may then transfer its line, or a part thereof, including the franchise of constructing and using the same, and may incorporate its stock issued for the construction of its road with the stock of the purchasing company. *Branch v. Jesup*, 106 U. S. 468.

3. Authority to a railroad company to consolidate with another "upon such terms as may be deemed just and proper," includes the power to transfer its franchises and privileges to the consolidated company, franchises and privileges being presumed to continue to exist in respect to the companies so consolidated. *Green County v. Conness*, 109 U. S. 104.

4. — **Effect of Consolidation — In general — Effect on Exemption from Taxation.** The consolidation of two railroad corporations dissolves them and creates a new one when, and only when, such is the legislative intent. *Central Railroad & Banking Co. v. Georgia*, 92 U. S. 665; *Atlantic & Gulf Railroad Co. v. Georgia*, 98 U. S. 359.

5. And where the statute authorizes the union and consolidation of stocks, rights, property, and franchises under the name of one of the corporations, and the assumption by that corporation of all contracts, and provides that the capital stock of that corporation, after issue of stock therein in lieu of the stock of the other corporation, shall not exceed the amount of the "authorized capital thereof," with that of the other corporation added, the intent is not that the former corporation shall be dissolved, but at most only that the latter shall be merged in it. *Central Railroad & Banking Co. v. Georgia*, 92 U. S. 665.

6. A provision in a state statute, permitting the consolidation of a railroad corporation with another like corporation in another state, which declares that the consolidated company shall possess all the rights and privileges vested in the original companies or either of them under the laws of either state, is not intended to transfer to the state by which it is enacted the legislation of the other state, but merely to vest in the new

**RAILROAD — CONSOLIDATION — continued.**

company the rights and privileges which the original company of that state had there before the consolidation. *Minot v. Philadelphia, Wilmington, & Baltimore Railroad Co.*, 18 Wal. 206.

7. Where a consolidation between two corporations is effected under a statute providing that the rights of all creditors of either corporation, as well as all liens, shall be preserved unimpaired, and that all debts and liabilities of either corporation shall attach to the new corporation and be enforced against it, the new corporation is liable for an internal revenue tax assessed against one of the old corporations. *Bailey v. New York Central & Hudson River Railroad Co.*, 22 Wal. 604.

8. Where a state statute authorizing the consolidation of foreign and domestic railroad corporations provides that the consolidated company shall in the state be subject to the state laws, it will be bound by an enactment establishing maximum rates for transportation equally with other corporations of the state. *Peik v. Chicago & Northwestern Railway Co.*, 94 U. S. 164.

9. Where a railroad corporation having the right to charge such passenger rates as it deems reasonable, accepts the provisions of legislation permitting its consolidation with another company, it brings itself within the power to amend, alter, or repeal charters, given by a constitution adopted before the consolidation but after the original incorporation. *Shields v. Ohio*, 95 U. S. 319.

10. Where a railroad company having by its charter an exemption from taxation for a limited period is merged in another company owning a connecting line and by its charter having a perpetual exemption, the latter, by the act of merger, taking all the property, rights, and privileges of the former, takes subject to the right of the state to tax at the expiration of the exemption period. The right to perpetual exemption is not to be extended without express words or necessary intendment. *Tomlinson v. Branch*, 15 Wal. 460; *Charleston v. Branch*, Id. 470.

11. But any property acquired by the company owning the consolidated roads, for the accommodation of business belonging to its original road as well as of that of the other, may be exempt *pro tanto*. *Branch v. Charleston*, 92 U. S. 677.

12. A consolidation of two railroad corporations will not affect the power to tax the property of the original corporations, either to extend or to limit it. If, therefore, by the original charter of the former corporation, there were immunity beyond a certain limit, immunity as to that property will remain, and if there were none in the charter of the latter, none will be conferred. *Central Railroad & Banking Co. v. Georgia*, 92 U. S. 665.

13. A railroad corporation, formed under a statute by the consolidation of existing companies, and "vested with all the rights, privileges, franchises, and property which may have been

**RAILROAD — CONSOLIDATION — continued.**

vested in either company prior to the act of consolidation," has no greater immunity from taxation than they severally enjoyed as to their several portions of the road under their respective charters. Whatever property was subject to taxation remains so after the consolidation. *Chesapeake & Ohio Railroad Co. v. Virginia*, 94 U. S. 718.

14. Where two or more corporations subjected to a special tax on the net income of their roads, with immunity from other taxation, the amount of such special tax being dependent on reports to be made and information communicated by their directors and other officers, are consolidated into a new corporation, with different directors and other officers, who are neither bound nor able to make the reports and give the information required of the original companies, the new corporation thus created is not entitled to the immunity of the original companies from general taxation. The immunity is deemed to have been waived. [STRONG, J., dissenting.] *Maine Central Railroad v. Maine*, 96 U. S. 493.

15. Although the statute authorizing the consolidation purports to continue to the new corporation the privileges and immunities which appertained to the old ones, a subsequent enactment may provide for its taxation in a manner not contemplated by the original charters, a code provision enacted after those charters were granted declaring corporations subject to be changed, destroyed, or modified at the will of the legislature, and that the state reserves the right to withdraw corporate franchises. *Atlantic & Gulf Railroad Co. v. Georgia*, 98 U. S. 359.

*Debts of Railroad Company — Not made a Lien by Consolidation.*

See RAILROAD — MORTGAGE, 4.

**RAILROAD — IN GENERAL — Construction —**

*Aid thereto in general.*

See MUNICIPAL BONDS; MUNICIPAL CORPORATION — FISCAL POWERS.

*Construction — Aid thereto — Grants of Public Land.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 28 et seq.

*Construction — Suit to compel Lessee to lay Track as agreed by Lessor — Necessary Parties.*

See REMOVAL OF CAUSES, 76.

*Directors may not profit at Expense of, when.*

See CORPORATION — OFFICERS, 11, 12.

*Judgment — When a Lien on Property.*

See JUDGMENT — LIEN, 6.

*Lien on Railroads — Advances — Work — Supplies.*

See LIEN, 13 et seq.

*Railroad Public Highway — State may authorize Tax in Aid.*

See TAX — POWER, 6.

**RAILROAD — IN GENERAL — continued.**

*Right of Way — Power of State to set aside Inquisition in Proceedings to condemn Land.*

See CORPORATION — CHARTER, 31.

*Right of Way in Territory granted by Congress — Denial by State.*

See STATES — RIGHTS AND POWERS, 10.

*Taxation under Internal Revenue Acts, in general — Bonds — Profits — Dividends.*

See INTERNAL REVENUE — PERSONS AND THINGS TAXED, 75 et seq.

*Taxation — Inter-State Commerce.*

See TAX — POWER, 15 et seq.

*Taxation — Relinquishment of Power to tax not to be presumed.*

See TAX — POWER, 86 et seq.

*Taxation — When, as a Federal Agency, exempt from State Tax.*

See TAX — POWER, 78 et seq.

*Taxation — Proceedings to equalize Taxes.*

See TAX — ASSESSMENT, 10 et seq.

**RAILROAD — MORTGAGE — In general — What constitutes.**

See pl. 1-5.

*Property covered — Property belonging to Different Divisions — After-acquired Property, etc.*

See pl. 6-15.

*Mortgage Bonds — Negotiability — Lien — Enforcement — Surrender, etc.*

See pl. 16-32.

*Priorities — Other Incumbrances — Liens of Contractors.*

See pl. 33-35.

*Mortgagor and Mortgagee — Right to Possession and Earnings.*

See pl. 36, 37.

*Payment — What constitutes, etc. — Merger of the Lien.*

See pl. 38-43.

*Foreclosure — Parties — Intervention — Defences.*

See pl. 43-48.

*Foreclosure — Receivers — Appointment — Discharge — Use of Earnings.*

See pl. 49-55.

*Foreclosure — Decree — Validity and Effect — Decree directing Sale, etc.*

See pl. 56-63.

*Foreclosure — Sale — How made — Proceeds — Effect — When set aside for Fraud.*

See pl. 64-79.

**1 — In general — What constitutes.]**

Where land was conveyed to a state by a railroad company, as indemnity against losses on state bonds loaned to the corporation, and the state foreclosed and purchased the land at the foreclosure

**RAILROAD — MORTGAGE — continued.**

sale, one who took the bonds from the company for value acquired no lien on the land which would follow it into the hands of the state's grantee, but at most a mere equity, which, the party chargeable being a state, could not be enforced. *Chamberlain v. St. Paul & Sioux City Railroad Co.*, 92 U. S. 293.

2. But the holder had no equity after a delay of twelve years, and after the grantee had acted in faith of a title, with the holder's acquiescence. *Ib.*

3. Where a statute gives a lien on property of a railroad to secure its guaranty of state bonds, the issue of which is invalid notwithstanding the statute, the lien may be enforced by holders of the bonds. A statute void in part for unconstitutionality will not be declared void altogether, if that part which is void can be separated from that which is valid. *Florida Central Railroad Co. v. Schutte*, 103 U. S. 118.

4. Where a consolidation of railroad corporations is effected pursuant to the statutes of Ohio, Indiana, and Illinois, and it is agreed that the debts of the several corporations shall be protected by the consolidated company, a debt not a lien before the consolidation does not become a lien by the act of consolidation. *Wabash, St. Louis, & Pacific Railway Co. v. Ham*, 114 U. S. 587.

5. Nor does the fact that the consolidated company issues bonds an exchange of which for outstanding unsecured bonds might be compelled by holders of the latter, make the unsecured bonds a lien in favor of a holder who has not offered to exchange them. *Ib.*

6. — *Property covered — Property belonging to Different Divisions — After-acquired Property, etc.* A railroad company owning a long line of road consisting of several divisions may assign particular portions of the rolling-stock to particular divisions, and mortgage each division with the rolling-stock so assigned separately. *Milwaukee & Minnesota Railroad Co. v. Milwaukee & St. Paul Railway Co.*, 2 Wal. 609.

7. Several mortgages on several divisions of a railroad, including all its rolling-stock, operate, in the absence of any specific apportionment in fact, on all the rolling-stock in the order of their dates. *Milwaukee & Minnesota Railroad Co. v. Milwaukee & St. Paul Railroad Co.*, 6 Wal. 742.

8. A mortgage of a railroad with its equipments, etc., although executed before the road is built, takes effect, on the principle of estoppel, as against the mortgagor and its privies, on all property covered by its terms, when it comes into existence as the property of the mortgagor. *Galveston, Houston, & Henderson Railroad Co. v. Cowdrey*, 11 Wal. 459.

9. A mortgage by a railroad company, covering all after-acquired property, attaches, where the property is loose property, like rolling-stock and not attached to the principal thing, subject

**RAILROAD — MORTGAGE — continued.**

to existing liens and to liens reserved for the purchase-money. *United States v. New Orleans & Ohio Railroad Co.*, 12 Wal. 362; *Fosdick v. Schall*, 99 U. S. 235; *Fosdick v. Southwestern Car Co.*, 99 U. S. 256.

10. A mortgage in terms covering after-acquired property, naming as such property engines, cars, and machinery, covers not only cars, etc., in existence at the date of the mortgage, but such as are subsequently acquired and are in existence at the time of foreclosure. *Shaw v. Bill*, 95 U. S. 10.

11. A mortgage given by a railroad corporation on all its property, including that to be acquired, covers a road purchased instead of built, the road being one which, under its charter, the corporation might have built and had the right to purchase. *Branch v. Jesup*, 106 U. S. 468.

12. A statute subjecting the chartered rights of all railroad companies to sale for payment of their debts inures to the benefit of mortgages already in existence as well as to that of mortgages made and judgments recovered after its enactment, especially of such as by their very terms cover all such rights. *Galveston, Houston, & Henderson Railroad Co. v. Cowdrey*, 11 Wal. 459.

13. Where state bonds were issued to a railroad company under a statute which declared that they should be a first lien on the "road and property" of the company, the word "property" was held to include lands granted by congress to aid in the construction of the road. *Wilson v. Boyce*, 92 U. S. 320; *Wilson v. McCrellis*, *Id.* 326.

14. A mortgage by a railroad company on its "property" should not be deemed to embrace municipal bonds issued in aid of the company, where the specific description of the items of property enumerated does not include them. *Smith v. McCullough*, 104 U. S. 25.

15. A statute incorporating a railroad company, which, exempting its property from taxation, confers power to raise money by "mortgage of its charter and works," does not confer power to mortgage all its franchises, including that of becoming and being a corporation. *Memphis & Little Rock Railroad Co. v. Railroad Commissioners*, 112 U. S. 609.

16. — *Mortgage Bonds — Negotiability — Lien — Enforcement — Surrender, etc.* In this country a railroad bond payable in blank is a negotiable instrument, although otherwise in England. *White v. Vermont & Massachusetts Railroad Co.*, 21 How. 575.

17. A coupon bond issued by a railroad company, otherwise a negotiable instrument, is not the less so because it contains a special agreement to issue full preferred stock upon the surrender of the bond and of a certificate attached to the bond by a pin, the certificate declaring the holder entitled to scrip preferred stock. And one who



**RAILROAD — MORTGAGE — continued.**

takes the bond is not charged with the duty of inquiry because of the absence of the certificate. *Hotchkiss v. Shoe & Leather National Bank*, 21 Wal. 354.

18. Where undelivered railroad bonds, each for two hundred and twenty-five pounds in London, or one thousand dollars in New York or New Orleans, payable to bearer, declaring that the president of the company was authorized to fix the place of payment by indorsement thereon, and bearing an unfilled blank form for that purpose, were stolen and sold with past-due coupons for ten or fifteen per cent of their face value attached, it was held that the uncertainty as to the amount payable deprived them of negotiability, and that at any rate, in the circumstances, the purchaser could not be deemed a *bona fide* holder. *Parsons v. Jackson*, 99 U. S. 434.

19. Where one purchases railroad bonds in open market, supposing them to be valid, and having no notice to the contrary, he is deemed a *bona fide* purchaser. *Galveston, Houston, & Henderson Railroad Co. v. Cowdrey*, 11 Wal. 459.

20. The holders of a part of the bonds secured by a second mortgage of a railroad and its rolling-stock cannot, by execution and sale of a part of the property, apply to the payment of their bonds alone, without regard to the right of their associates to a *pro rata* distribution in case of a deficiency, or the right of the holders of bonds secured by the first mortgage to a priority. *Pen-nock v. Coe*, 23 How. 117.

21. Where a mortgage by a railroad company to secure payment of bonds payable in twenty years from their date, provided that in case of proceedings to coerce payment of principal or interest, all the bonds and accrued interest should be a lien in common therewith, should be equally due and payable, and should be entitled to a *pro rata* dividend of the proceeds, but that in no case should "the principal of any bond be considered due until twenty years from the date thereof," it was held, on a sale within that time, that the overdue coupons were not entitled to precedence in distribution of the proceeds. *Dunham v. Cincinnati, Peru, & Chicago Railway Co.*, 1 Wal. 254.

22. Where a railroad company issues its mortgage bonds under a statute providing that they shall not mature for thirty years, a provision in the bonds that they shall become due on default in payment of coupons, continued for six months, is void; but the mortgage may provide for foreclosure for non-payment of interest, and a foreclosure may be decreed for default therein, and, on a sale, the proceeds thereof will be brought into court, and the liens protected. *Howell v. Western Railroad Co.*, 94 U. S. 463.

23. A holder of a few of the bonds secured by a mortgage on a railroad will not be aided by a court of equity to defeat the wishes of a large majority of the bondholders, unless ample cause is shown for invoking the action of the court.

**RAILROAD — MORTGAGE — continued.**

*Shaw v. Little Rock & Fort Smith Railroad Co.*, 100 U. S. 605.

24. A railroad company, liable to the *bona fide* holders of bonds put on the market by the fraud of the company's agents, cannot claim that it is liable only for the amount actually paid for the bonds. The amount of the bonds determines the liability. *Florida Central Railroad Co. v. Schutte*, 103 U. S. 118.

25. Where one purchased railroad bonds with overdue unpaid interest coupons attached, the bonds declaring that, on default in payment of any instalment of interest continued for six months after demand, the principal should become due, the mortgage providing that the principal should become due after six months' default, and saying nothing about demand, it was held that the language of the bonds should control, that there having been no demand the principal was not due, and that therefore the bonds were not dishonored when purchased. *Indiana & Illinois Railway Co. v. Sprague*, 103 U. S. 756.

26. Where a railroad company sends to holders of bonds secured by junior mortgages a circular proposing that they surrender their bonds in exchange for preferred stock, "to be seven per cent stock and not cumulative, but to share with the common stock any surplus which may be earned over and above seven per cent upon both in any one year;" and the bondholders accept the proposal, and an indenture is prepared by a committee appointed to "carry out the intention" of that proposal and duly executed, providing that the preferred stock "shall be entitled to a dividend of seven per cent from the net earnings" before "any dividend shall be declared" on unpreferred stock, "and to an equal dividend" with the latter in net earnings "beyond said seven per cent, but shall at no time be entitled to an accumulated dividend;" and stock certificates are issued to carry the agreement into effect, reciting that they are issued "subject to the terms and conditions of the indenture," and declaring that the holders are entitled "to receive all the net earnings" of the company "which may be divided pursuant to the indenture in each year up to seven dollars per share, and to share in any surplus beyond seven dollars per share, which may be divided upon the common stock," — the holders of such certificates are entitled, upon all the instruments, construed together as *in pari materia*, to no dividend in any one year beyond their seven per cent until after a like dividend on the unpreferred stock, and after that to an equal division. *Bailey v. Hannibal & St. Joseph Railroad Co.*, 17 Wal. 96.

27. Where creditors of an insolvent railroad corporation became holders on its reorganization of preferred stock, which, it was agreed, should be "entitled to preferred dividends out of the net earnings (if earned in the current year, but not otherwise) . . . after payment of mortgage interest and delayed coupons in full," and after-

**RAILROAD — MORTGAGE — continued.**

wards the corporation leased other roads, and the leases proving unprofitable, not enough was left for the payment of dividends on the preferred stock, it was held that the losses on leases were not to be separated from the other transactions of the corporation, but were properly charged against the general earnings of the road, and that as, on this basis, there were no "net earnings," the preferred stockholders could claim nothing. *St. John v. Erie Railway Co.*, 22 Wal. 136.

28. A railroad company denied its liability on certain bonds, and brought a suit in the state court against A., B., and others to obtain their cancellation. A., assuming to represent all the holders, proposed to surrender all the bonds, the company to issue others in lieu thereof. This was agreed to, and a decree was entered by consent cancelling the bonds and discharging the mortgage by which they were secured. B. delivered the bonds which he held, and received his share of the new issue. The other bonds A. could not control, other parties claiming them, but he brought a suit in the federal court to compel the company to deliver the new bonds to him. It was held that the company was not bound to make the delivery except on the actual surrender of the outstanding bonds, or due proof of loss and an offer of indemnity; that it was not bound to deal with the individual holders respectively, nor to litigate their claims; that the decree in the state court was not, however, a bar to the suit for an appropriation of the fruits of the settlement; and that the holders of the bonds, though not parties to that suit, might treat the settlement as made for their benefit, and act accordingly. *Kansas Pacific Railway Co. v. Stewart*, 95 U. S. 279.

29. Coupons assigned without a guaranty have no equity as against the mortgaged property, over the bonds from which they have been detached, or over subsequently maturing coupons. All stand on the same level. *Ketchum v. Duncan*, 96 U. S. 659.

30. A purchaser at a sale by trustees of a state improvement fund, like that of Florida, of a railroad bound by its charter for the payment of a certain percentage "on the amount of indebtedness on bond account" to go toward a sinking fund for the redemption of the bonds of the company, cannot be compelled in equity to pay such percentage on bonds taken up with the proceeds of the sale. The statute is a condition of the sale and a contract with the purchaser. *Doggett v. Florida Land Co.*, 99 U. S. 72.

31. An acceptance by a railroad company of the Ohio statute of 1852, authorizing such companies to guarantee the bonds of other companies, may be inferred, if necessary, in favor of a holder of bonds so guaranteed, from the act of guaranty. *Zahriskie v. Cleveland, Columbus, & Cincinnati Railroad Co.*, 23 How. 381.

32. And, as against an innocent purchaser of such bonds for value, a stockholder of the com-

**RAILROAD — MORTGAGE — continued.**

pany which stands as guarantor will not be permitted to contest the validity of the guaranty, when he was present at a meeting of the stockholders called to ratify the act of the directors in making the guaranty, and declined to vote against a resolution ratifying the act, which could not have been passed had he voted against it. *Ib.*

33. — *Priorities — Other Incumbrances — Liens of Contractors.* A mortgage by a railroad company of its road "built and to be built" has precedence, as a mortgage, even of the unbuilt part, of a claim of a contractor who has finished the road under an agreement with the company that he shall retain possession and apply the earnings to payment of himself, and who has retained possession accordingly. [DAVIS, J., dissenting.] *Dunham v. Cincinnati, Peru, & Chicago Railway Co.*, 1 Wal. 254.

34. A junior mortgage can take no priority as a lien on a part of the road merely because that part was built entirely with the avails of the mortgage, that part being a part of the chartered route and covered by the terms of the prior mortgage; nor on the ground that those avails conserved the road and rendered it capable of being operated. *Galveston, Houston, & Henderson Railroad Co. v. Cowdrey*, 11 Wal. 459.

35. Creditors of a railroad company who take preferred stock cannot, ordinarily, claim a priority over creditors of the company whose debts are contracted subsequently. *Warren v. King*, 108 U. S. 389.

36. — *Mortgagor and Mortgagee — Right to Possession and Earnings.* Purchasers of the property and franchises of a railroad company at a sale on execution are not liable for tolls and income without notice and demand to a mortgagee under a mortgage which covers tolls and income in case of default, where the mortgage provides that on demand and non-payment of interest, etc., the mortgagee may take possession and appropriate tolls and income. *Galveston, Houston, & Henderson Railroad Co. v. Cowdrey*, 11 Wal. 459.

37. The right of a railroad company to the possession of its road, notwithstanding a mortgage, until possession is taken by the mortgagee or proceedings are instituted for a breach, includes the right to earnings; and although a decree of foreclosure orders a sale, until the sale, the decree being silent on the subject, the mortgagee cannot interfere with the right of the company and its general creditors to retain possession and earnings. *Gilman v. Illinois & Mississippi Telegraph Co.*, 91 U. S. 603.

38. — *Payment — What constitutes, etc. — Merger of the Lien.* Upon the question of whether coupons were paid and extinguished, or whether the firm paying them was entitled to the protection of the mortgage given to secure them and the bonds to which they belonged, it appearing that the money used to take them up was the money of the firm and not that of the railroad

**RAILROAD — MORTGAGE — continued.**

company which issued them; that the firm intended to keep them alive; that the company could not pay them; that the holders knew that they were not paid in the usual place or by those accustomed to pay them; that some of the holders knew that the company was not paying them, while others were told that they were purchased, and others made no inquiry, transferring them on payment; that none of the original holders denied that there was a purchase, — it was held that they were not to be deemed extinguished, although the firm for several years had been the financial agent of the company and the one of its members who, as assignee, claimed the protection of the security, was a director at the time. *Ketchum v. Duncan*, 96 U. S. 659.

39. Where the holders of railroad mortgage bonds, incorporated and operating the road purchased on foreclosure under their mortgage, pay off a prior incumbrance which is pressed to a decree, they cannot maintain a bill to recover the money so paid, as paid under a mistake of fact, merely because after payment the sale at which they purchased is set aside on a creditor's bill as fraudulent, the mistake, if any, being a mistake of law, and the sale being good except as against the creditors who brought the bill; and it makes no difference that one of the creditors was also one of the purchasing bondholders and advised the sale. [*CHASE, C. J., and MILLER and FIELD, JJ., dissenting.*] *Milwaukee & Minnesota Railroad Co. v. Soutter*, 13 Wal. 517.

40. A constitutional provision that "the general assembly shall have no power, for any purpose whatever, to release the lien held by the state upon any railroad," does not preclude a compromise with a railroad corporation whereby the state accepts less than the amount due, and a release of the lien on the compromise being effected. [*MILLER and DAVIS, JJ., dissenting.*] *Woodson v. Murdock*, 22 Wal. 351.

41. Nor is the case affected by the fact that a constitutional ordinance adopted simultaneously with the constitution, after providing for the sale of the roads of corporations indebted to the state, ordained that no sale should be made by the state of a road bought in by the state at such sale, "without reserving a lien upon the property and franchises thus sold . . . for all sums remaining due," this provision relating only to the sum to become due on a second sale by the state made after her having become an owner by purchase at the first sale. [*MILLER and DAVIS, JJ., dissenting.*] *Ib.*

42. Where railroad property is sold by trustees, in whom, and not in the bondholders whom the trustees represent, is the right to sell, the sale being made by virtue of the joint lien of all the bonds, and the purchaser taking a title clear of them all, subject only to the vendor's lien for that part of the purchase-money remaining unpaid, the original lien of the bonds is consummated and merged in the title acquired by the purchaser,

**RAILROAD — MORTGAGE — continued.**

and cannot be set up anew by a party holding some of these bonds, at least, unless such party is prepared to repudiate the sale and bring back upon the property, in coexistence with his own claim, the lien of other bonds cancelled by being given in part payment for the property. *Florida v. Anderson*, 91 U. S. 667.

43. — *Foreclosure — Parties — Intervention — Defences.*] Where the trustees under a railroad mortgage are dead, a bondholder may file a bill to foreclose in behalf of himself and all other holders of bonds secured by the same mortgage; and where there are several mortgages the trustees of which are dead, and the complainant holds bonds secured by each mortgage, the bill may be filed in behalf of himself and all holders of bonds under each mortgage; or several such bondholders may jointly maintain such a bill. *Galveston, Houston, & Henderson Railroad Co. v. Cowdrey*, 11 Wal. 459.

44. Where a railroad company mortgaged its property to its bondholders by name, to secure specifically to each the amount due to him, it was held, the sufficiency of the security being doubtful, that a single bondholder could not alone maintain a foreclosure suit, although he assumed to sue in behalf of himself and such others as might come in and contribute to the expenses of the suit, the other bondholders being entitled to notice enabling them to see that the property is advantageously sold, and in equity, as well as at law, a suit on a written instrument being maintainable only in the names of all formal parties who still have an interest. *Nashville & Decatur Railroad Co. v. Orr*, 18 Wal. 471.

45. Purchasers under a decree of foreclosure of a mortgage on one portion of a railroad cannot intervene in the supreme court, on appeal from a decree of foreclosure of another mortgage on another portion of the road, in order to contest a decree by consent for a sum larger than was decreed in the circuit court, on the ground that, as they have bought all the rolling-stock, and are general creditors of the company, such a decree would prejudice their rights. *Bronson v. La Crosse & Milwaukee Railroad Co.*, 2 Black, 524.

46. Where a mortgage was given to trustees to secure railroad bonds to a certain amount, and in proceedings to foreclose, some of the holders of bonds issued at a large discount were adjudged entitled to no more than they had paid, so that a margin remained of the mortgage security, a holder, not a party to those proceedings, who took his bonds in payment for materials furnished for building the road under an agreement made before the mortgage, that if the company should sell bonds for less than he paid, he should have additional bonds, was held not entitled to have his demand attached to the mortgage, and his outstanding equity adjusted in those proceedings, bonds for the entire sum having been issued. *Vose v. Bronson*, 6 Wal. 452.

**RAILROAD — MORTGAGE — continued.**

47. Where a mortgage provides that, after six months' default in payment of interest, the principal shall become due, that the trustees may so declare and notify the mortgagors, and that on the written request of the holders of a majority of the bonds secured by the mortgage the trustees shall proceed to collect principal and interest by foreclosure and sale, the written request of a majority of the bondholders is an indispensable prerequisite to the right of the trustees to act. [WAITE, C. J., and HARLAN, J., dissenting.] *Chicago, Danville, & Vincennes Railroad Co. v. Fosdick*, 106 U. S. 47.

48. To a bill to foreclose a mortgage given to secure payment of negotiable railroad bonds, brought by a *bona fide* holder of the bonds for value, no defence is available that would not be allowed in an action at law on the bonds. *Kenicott v. Wayne County Supervisors*, 16 Wal. 452.

49. — [Foreclosure — Receivers — Appointment — Discharge — Use of Earnings.] Where a court of equity having jurisdiction of the subject-matter and the parties takes charge of a railroad and its appurtenances, as of a trust fund for the payment of incumbrances, it may appoint managing receivers of the property, and for its preservation and management may authorize money to be raised, and declare it a paramount lien on the fund. *Wallace v. Loomis*, 97 U. S. 146.

50. Where mortgagees of a railroad seek, in equity, to foreclose the mortgage, the court, as a condition of appointing, on their application, a receiver, may, in the exercise of its discretion, order the payment of outstanding debts incurred for labor and supplies before the bringing of the foreclosure suit, but during the period of default. The mortgagees having delayed suit, presumably have profited from the labor and supplies, and the receiver having, notwithstanding the order, applied current income, with the consent of the mortgagees, to the permanent improvement of the road, may be ordered to pay the debts for such labor and supplies from the proceeds of the sale of the road, although these proceeds are insufficient for the payment of the mortgage debt. *Union Trust Co. v. Souther*, 107 U. S. 591. And the holder of such a debt, by assignment from the original creditor, is entitled to payment in like manner as his assignor. *Union Trust Co. v. Walker*, 107 U. S. 596. And see *Burnham v. Bowen*, 111 U. S. 776.

51. The earnings of a railroad in the hands of a receiver are chargeable with the value of goods lost in transportation, and damages done to property, during his management. *Cowdrey v. Galveston, Houston, & Henderson Railroad Co.*, 93 U. S. 352.

52. While the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors, cannot be taken away from them and used to pay general creditors of the road, yet, if current earnings are used for the benefit of mortgage creditors before current expenses are paid,

**RAILROAD — MORTGAGE — continued.**

the amount so used should be restored, and the current expenses paid therefrom. *Fosdick v. Schall*, 99 U. S. 235; *Huidekoper v. Hinckley Locomotive Works*, Id. 258; *Hale v. Frost*, Id. 389; *Burnham v. Bowen*, 111 U. S. 776.

53. Circumstances may exist which may make it necessary and proper for the receiver of railroad property, pending a foreclosure suit, to pay, under order of court, pre-existing debts from current earnings, or even from the *corpus* of the property. The question as to payment of such debts, however, stands *prima facie* on a different basis from that of the payment of debts incurred under the receivership, and such payment is permissible only under special circumstances. *Miltenberger v. Logansport, Craefordsville, & Southwestern Railway Co.*, 106 U. S. 286.

54. In proceedings to foreclose a mortgage of a railroad, the court has no discretion to refuse to discharge a receiver and restore the mortgagor to possession, when the sum due has been determined by the supreme court, and the mortgagor offers to pay it; and a refusal is such error as the supreme court may correct, if the matter be in any way properly before it. *Milwaukee & Minnesota Railroad Co. v. Souther*, 2 Wal. 510.

55. And the court may direct a discharge of the receiver in such case, although other parties allege liens on the road, their claims being disputed and relatively small, but upon condition that the company give security to pay them if established. *Id.*

56. — [Foreclosure — Decree — Validity and Effect — Decree directing Sale, etc.] A decree foreclosing a mortgage on the property of a railroad corporation is not invalid because a part of the property ordered to be sold is situated in another state than that comprising the district wherein the United States circuit court rendering the decree has jurisdiction. *Muller v. Dows*, 94 U. S. 444.

57. A provision in a decree ordering a sale in such proceedings is not inequitable because it permits bidders to pay in mortgage bonds held by them, thereby giving to the larger bondholders advantages over the smaller ones. *Ketchum v. Duncan*, 98 U. S. 659.

58. Where the decree requires a notice of the sale to be published in a certain newspaper, the order is substantially complied with by a publication in another newspaper, into which the paper named has been merged, the same persons being reached. *Sage v. Central Railroad Co.*, 99 U. S. 334.

59. Where, by the terms of the decree, the purchaser is expressly required to take the property subject to established liens, he may not contest the validity of such liens, even on the ground of fraud, he not proposing to surrender the property. *Swann v. Wright*, 110 U. S. 590; *Swann v. Clark*, Id. 602.

60. The fact that trustees representing mortgage bondholders were themselves holders of

**RAILROAD — MORTGAGE — continued.**

some of the bonds, will not necessarily render them incompetent to consent to a decree in which their interests may be benefited, no ground for suspicion of fraud or unfairness appearing. *Shaw v. Little Rock & Fort Smith Railroad Co.*, 100 U. S. 605.

61. Under an agreement in a mortgage of railroad property, that in case of a foreclosure sale the trustee, if requested by a majority of the bondholders, shall buy the property for their benefit, no bondholder to have any claim on the proceeds except for his *pro rata* share thereof, as represented in a new company to be formed for their benefit, the trustee to organize the same under their direction, and to convey the property to it, the court, in proceedings to foreclose, all parties being before it, may direct the trustee to bid at the sale at least the amount of the debt secured by the mortgage, and may provide for a complete execution of the trust. *Sage v. Central Railroad Co.*, 99 U. S. 334.

62. And although the specific relief sought is a strict foreclosure, a prayer for general relief will enable the court to direct a sale of the property in the enforcement of the agreement. *Ib.*

63. The court, in decreeing a sale, may require of the purchaser, in case he be any one other than the trustee, a cash payment of a part of his bid. *Ib.*

64. — *Foreclosure — Sale — How made — Proceeds — Effect.*] Where the real estate of a railroad corporation is mortgaged in connection with its franchises and personal property, the mortgaged property must be sold as an entirety. A statute, which, like the Illinois statutes, gives a right to redeem mortgaged land sold under a decree, has no application in such a case. *Hammock v. Farmers' Loan & Trust Co.*, 105 U. S. 77.

65. Holders of railroad mortgage bonds who become parties to a scheme for a foreclosure and sale, in order to form a new company, and afterwards surrender their bonds in exchange for stock and bonds of the new company, cannot be heard to object to the confirmation of the sale. *Crawshaw v. Soutter*, 6 Wal. 739.

66. In giving effect to proceedings instituted to enforce a lien on a railroad, it will not be presumed, in the absence of an explicit allegation, that more was sold than was embraced by the lien. *Wilson v. Gaines*, 103 U. S. 417.

67. Where by a sale of the property of an insolvent railroad company on foreclosure, expedited and rendered advantageous by an arrangement between the mortgagees and the stockholders, a part of the proceeds is to go to the stockholders, the general creditors may in equity compel the purchasers to pay that part to them, although the mortgages were for an amount largely exceeding the value of the property, so that if there had been a foreclosure independent of arrangement the proceeds of the sale would all have gone to

**RAILROAD — MORTGAGE — continued.**

the mortgagees. *Chicago, Rock Island, & Pacific Railroad Co. v. Howard*, 7 Wal. 392.

68. A purchaser of a railroad at a foreclosure sale, whose possession is delayed by reason of his delay in complying with the terms of sale, cannot claim any part of the earnings of the road during the period of delay. *Osterberg v. Union Trust Co.*, 93 U. S. 424.

69. An agreement which the plaintiffs might have enforced against a railroad company may not be enforced against another company acquiring by a foreclosure sale the property of the company making the agreement, the liability resting wholly in contract, and the new company taking the property freed from the burden of the agreement, and never having assumed, expressly or by implication, any liability growing out of the agreement. *Sullivan v. Portland & Kennebec Railroad Co.*, 94 U. S. 806.

70. Where a state foreclosed a mortgage on the property of a railroad company whose property was exempt from taxation, bought in the property at the foreclosure sale, and sold it to parties who organized a new company, the state having then adopted a new constitution prohibiting the passage of special laws exempting any property of persons or corporations other than municipal corporations from taxation, it was held that the purchase by the state ended that exemption, that the new constitution forbade the renewal as well as the creation of an exemption, and that a provision in an "ordinance for the payment of state and railroad indebtedness," adopted with the constitution and authorizing the legislature to provide for the sale of the franchises of defaulting corporations, could not be deemed to provide for a sale inconsistent with the constitution. *Trask v. Maguire*, 18 Wal. 391.

71. On a sale of the property and franchises of a railroad corporation, under a decree founded on a mortgage which, in terms, covers franchises, or under a process on a money judgment, immunity of the property from taxation, under the charter, does not accompany it in the transfer to the purchaser; such immunity not being a franchise, but a privilege, and not transferable. *Morgan v. Louisiana*, 93 U. S. 217; *Louisville & Nashville Railroad Co. v. Palmes*, 109 U. S. 244; *St. Louis, Iron Mountain, & Southern Railway Co. v. Berry*, 113 U. S. 465.

72. Nor does it pass on a sale of a road in the enforcement of a statutory lien of the state on the property of the company. *Wilson v. Gaines*, 103 U. S. 417.

73. And it makes no difference in any case that the company is by its charter empowered to lease or sell to or to consolidate with any other company. *Louisville & Nashville Railroad Co. v. Palmes*, 109 U. S. 244.

74. Purchasers on foreclosure of a mortgage of a railroad exempt from taxation, executed under a power to raise money by "mortgage of its charter and works," cannot organize as corpora-

**RAILROAD — MORTGAGE — continued.**

tors and avail themselves of such exemption as a part of the franchise, without regard to the general rule that such exemptions shall be deemed to intend a personal privilege. *Memphis & Little Rock Railroad Co. v. Railroad Commissioners*, 112 U. S. 609.

75. — *Foreclosure — Sale — When set aside for Fraud.*] A sale of a railroad under decree of foreclosure to a new company composed of the old directors and others, set aside at suit of creditors as fraudulent, the fraud being found from large issues of mortgage bonds to secure small debts, subsequent purchases thereof by the directors at a nominal price, and a gross overstatement of the debt in the notice of sale. *James v. Milwaukee & Minnesota Railroad Co.*, 6 Wal. 752.

76. Where a railroad was sold under a decree of foreclosure for a sum far below its value, the sale was set aside as fraudulent against creditors, and the purchaser held as trustee for the complaining creditors for the full value of the property with interest, less a sum actually paid to a lien creditor, the sale having been made pursuant to a scheme between the directors and the purchaser, by which the directors escaped liability on indorsements of the company's paper. *Drury v. Cross*, 7 Wal. 299.

77. A sale of valuable railroad property for a grossly inadequate sum to a confederation of a small minority in number and interest of mortgage bondholders who are also managers and officers will be set aside, where it is apparent that the whole proceeding was in fraud of the rights of the bondholders generally, and was designed to enable the confederates to obtain possession of the property at a low price for speculative purposes of their own. Bondholders have a community of interest which involves mutuality of obligation, and managers and officers are so far trustees that they are precluded from acquiring the property at a loss to the company. *Jackson v. Ludeling*, 21 Wal. 616.

78. Where a railroad subject to several mortgages is sold on an amicable foreclosure on one of them against the company and the trustees in the others, the foreclosure being resorted to in order to carry out an arrangement made by a majority of stockholders, bondholders, and creditors for a sale of the road and a division of the proceeds, to which a minority object, a bill by the minority to set aside the sale as collusive and fraudulent, etc., cannot be maintained unless the trustees in the several mortgages, and parties representative of the several classes of persons who have participated in the distribution, are joined with the purchaser and the company as parties defendant. They might have to refund. *Ribon v. Chicago, Rock, Island, & Pacific Railroad Co.*, 16 Wal. 446.

79. Where a sale on foreclosure of a mortgage of a railroad was set aside as a fraud upon creditors, the mortgage was adjudged to remain as

**RAILROAD — MORTGAGE — continued.**

security for bonds in the hands of *bona fide* holders for value who had not participated in the fraud. *James v. Milwaukee & Minnesota Railroad Co.*, 6 Wal. 752.

*Bonds voidable when, and when valid.*

See CORPORATION — OFFICERS, 12.

*Operation of Road under Orders of Court.*

See COURT — IN GENERAL, 24.

*Receivers — Powers and Duties.*

See RECEIVER.

**RAILROAD — PARTICULAR ROADS — Construc-**

*tion of Charters and Statutes — Pacific Railroads — Baltimore & Potomac Railroad.*] On consideration of §§ 5, 6, act of July 1, 1862 (12 Sts. 489), in aid of the Union Pacific Railroad, of § 5, amendatory act of July 2, 1864 (13 Sts. 356), and of the scheme of the original act and the purposes contemplated by it, it was held that the company was not required to refund to the government the interest paid on the bonds issued to the company, before their maturity, the provision in the charter that the company "shall pay said bonds at maturity" not implying an obligation to pay the interest as it should semi-annually accrue. *United States v. Union Pacific Railroad Co.*, 91 U. S. 72; *United States v. Union Pacific Railroad Co.*, 98 U. S. 569.

2. The net earnings of that road, five per cent of which the company is bound, under the act of 1862, to apply to the payment of those bonds, are to be ascertained by deducting from the gross earnings all the ordinary expenses of organizing and operating the road, and expenditures made *bona fide* in improvements, and paid out of earnings and not by the issue of bonds or stock, not deducting interest on any of the bonded debt of the company. The earnings of the road include all the receipts arising from its operations as a railroad company, but not those from the public lands granted, nor fictitious receipts for the transportation of its own property. *Union Pacific Railroad Co. v. United States*, 99 U. S. 402.

3. The case of the Central Pacific Railroad Company is the same, and is governed by the same considerations. *United States v. Central Pacific Railroad Co.*, 99 U. S. 449. See also *United States v. Kansas Pacific Railway Co.*, 99 U. S. 455.

4. The Union Pacific Company is estopped to deny that its road was completed November 6, 1869, so far as completion bears upon the duty of the company so to apply earnings "after said road is completed," the company having then reported the road as completed, the president of the United States having then accepted it provisionally, and the company having then obtained the bonds. *Union Pacific Railroad Co. v. United States*, 99 U. S. 402.

5. The case of the Central Pacific Railroad Company is the same, and is governed by the same

**RAILROAD — PARTICULAR ROADS — continued.**

considerations. *United States v. Central Pacific Railroad Co.*, 99 U. S. 449.

6. Although to the payment of those bonds the Union Pacific Company was so to apply earnings of the company, the act of 1864, authorizing the company to issue an equal quantity of first-mortgage bonds, to have priority over the government bonds, authorized the payment of the interest accruing on the first-mortgage bonds out of the net earnings of the road, in preference to the five per cent thereof payable to the government. [STRONG and HARLAN, JJ., dissenting.] *Union Pacific Railroad Co. v. United States*, 99 U. S. 402.

7. The case of the Central Pacific Railroad Company is the same, and is governed by the same considerations. *United States v. Central Pacific Railroad Co.*, 99 U. S. 449.

8. The same also of the case of the Sioux City and Pacific Railroad Company. *United States v. Sioux City & Pacific Railroad Co.*, 99 U. S. 491.

9. The bonds granted by the United States to the Kansas Pacific Railway Company are not a lien on, nor is the company liable for five per cent of the net earnings of, that portion of its road west of the one hundredth meridian. Such must be the conclusion from all the statutes relating to the subject, particularly § 5, act of July 1, 1862 (12 Sts. 489), which extends the lien only to the road "in consideration of which" the bonds might be issued, and § 3, act of March 3, 1869 (15 Sts. 324), which authorizes a mortgage of the portion of the road west of that meridian. *United States v. Kansas Pacific Railway Co.*, 99 U. S. 455; *United States v. Denver Pacific Railway Co.*, Id. 460.

10. The act of May 7, 1878 (20 Sts. 56), which provides for the establishment of a sinking fund in the federal treasury for the payment of the bonds issued to the Union Pacific and the Central Pacific companies at maturity, and the application thereto of a greater part of the earnings of the roads (the earnings being divided among stockholders without regard to any preparation for such payment), does not thereby take property without due process of law, or in any way interfere with vested rights, the right of alteration or amendment being reserved, and is a reasonable regulation of the affairs of the companies and a valid exercise of legislative power. The reservation of the right of amendment is a retention of power to prescribe for the government of the corporation whatever might be prescribed by the original charter. [FIELD, STRONG, and BRADLEY, JJ., dissenting.] *Union Pacific Railroad Co. v. United States [Sinking Fund Cases]*, 99 U. S. 700.

11. And it makes no difference that one of the companies is chartered by a state, such regulation of the affairs of the company not being inconsistent with the charter, and the state not objecting. [FIELD, STRONG, and BRADLEY, JJ., dissenting.] *Id.*

**RAILROAD — PARTICULAR ROADS — continued.**

12. The eastern terminus of the Iowa branch of the Union Pacific Railroad, defined as "a point on the western boundary of the state of Iowa," must be deemed to be on the Iowa, not on the Nebraska, shore of the Missouri River, the legal boundary of the state being in the middle of the channel of the river; and hence the bridge constructed by the railroad company over the river between Omaha, Nebraska, and Council Bluffs, Iowa, is a part of that branch, and the railroad must be operated to its eastern terminus, as one continuous line. [BRADLEY, J., dissenting.] *Union Pacific Railroad Co. v. Hall*, 91 U. S. 343.

13. No decree can be rendered against the Union Pacific Railroad Company under the act of March 3, 1873 (17 Sts. 509), which directs a suit in equity against the company and all persons in receipt of property, etc., which ought in equity to belong to the company or to the government, on a bill setting forth construction contracts and the like, in which the directors or a majority of them are adversely interested, where the company does not complain by cross-bill or otherwise, but resists the suit, and there is no allegation and no joinder of *bona fide* stockholders not interested in such contracts. [SWAYNE and HARLAN, JJ., dissenting.] *United States v. Union Pacific Railroad Co.*, 98 U. S. 569.

14. Nor has the government as a lender to the company, having a lien on the road and a right to half of what the road earns as a carrier for the government and to five per cent of the road's net earnings as security, a right to relief on the ground of such contracts by way of collection of the sums of which the company has been so defrauded; nothing being due on the loan, and it being not improbable that the share of earnings to which the government is entitled will be sufficient to pay the debt on maturity; and this, although the road is insolvent. *Id.*

15. Nor can the bill be maintained as a bill of discovery, the act providing that the government shall have free access to all the books and correspondence of the company. *Id.*

16. Nor can it, on the principles ordinarily governing courts of equity, on the ground that the government, as donor of lands, rights, and privileges of great value, and as *parens patriæ*, is a trustee invested with power to enforce the proper use of the property and franchises granted, for the benefit of the public. *Id.*

17. The Missouri statute of January 7, 1865, authorizing St. Louis county to issue bonds in aid of the Pacific Railroad of Missouri under such conditions as might be agreed upon between the county and the railroad company, and directing the state official who, under existing laws, controlled, in behalf of the state, the earnings of the road, to pay monthly from such earnings certain sums into the county treasury to meet the interest on the bonds issued, must be deemed, when construed in connection with the negotiations ante-

**RAILROAD—PARTICULAR ROADS—continued.**

cedent to its passage and the understanding apparently had by the county and the company, to subject such earnings, to the extent necessary to meet the interest, to a lien or charge, enforceable notwithstanding a subsequent change of ownership of the road, the statute giving constructive notice of the existence of the lien. [STRONG and BRADLEY, JJ., dissenting.] *Ketchum v. St. Louis*, 101 U. S. 306.

18. Nothing in the Maryland charter of the Baltimore and Potomac Railroad Company, nor in the acts of congress relating to the company, nor in the revised statutes of the District of Columbia, authorizes it to lay tracks in the streets of Washington without express permission from congress. *District of Columbia Commissioners v. Baltimore & Potomac Railroad Co.*, 114 U. S. 453.

**RAILROAD—STATE REGULATION—Limitation by Statute of the Rates for Transportation—When constitutional—Regulation of Commerce—Taking Property without Due Process of Law—Impairment of Obligation of Contract, etc.**

See pl. 1-10.

**Abandonment of Stations—Contract by Commissioners.**

See pl. 11.

1. — *Limitation by Statute of the Rates for Transportation—When constitutional—Regulation of Commerce—Taking Property without Due Process of Law—Impairment of Obligation of Contract, etc.* A state statute providing under a penalty that each railroad company shall annually fix its rates for transportation, whether of freight or of passengers, and shall post and keep posted a "printed copy" of such rates at all its depots and stations, is a mere police regulation, and not, as applied to roads running through several states, a regulation of inter-state commerce. *Chicago & Northwestern Railway Co. v. Fuller*, 17 Wm. 560.

2. In the absence of action by congress, a state statute establishing maximum rates of charges for the transportation of freight and passengers on the various railroads in the state, is not unconstitutional as a regulation of commerce, although such roads are also engaged in inter-state as well as in state commerce, their business being carried on in the state, and its regulation a matter of domestic concern. *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & Northwestern Railway Co.*, Id. 164.

3. A state statute which establishes maximum rates of charges for the transportation of freight and passengers on the roads of the state, dividing the roads into classes, according to the amount of business, and fixing a rate for each class, *e. g.*, the Iowa statute of March 23, 1874, is not in conflict with a state constitution which provides that "all laws of a general nature shall

**RAILROAD—STATE REGULATION—continued.**

have a uniform operation," and that the legislature "shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens," such statutes granting to any railroad company only what it grants to any other on the same terms. *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*, 94 U. S. 155.

4. A state statute fixing maximum rates of charges for the transportation of freight and passengers on the railroads of the state, *e. g.*, the Iowa statute of 1874, and the Wisconsin statute of March 11, 1874, is not unconstitutional as depriving of property without due process of law, as railroads are devoted to a use in which the public has an interest, and so submitted, to the extent of that interest, to public control for the public good. [FIELD and STRONG, JJ., dissenting.] *Id.*; *Peik v. Chicago & Northwestern Railway Co.*, 94 U. S. 164.

5. A state statute establishing "maximum rates of charges for the transportation of freight and passengers" on the railroads of the state, as, *e. g.*, the Iowa statute of 1874, does not impair the obligation of the contract imported by a charter, in the absence of any special charter provision protecting against legislative regulation, nor of contracts between the company and lessors and creditors who have acted in reliance on the charter, railroad corporations being engaged in a public employment affecting public interests, and so subject to public control; and it makes no difference that the power to regulate has lain dormant for more than twenty years since the grant of the charter, such powers not being lost by non-user. [FIELD and STRONG, JJ., dissenting.] *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*, 94 U. S. 155.

6. Nor is such a statute unconstitutional as applied to a company whose charter authorizes it to demand and receive such sums for transportation "as it shall deem reasonable," the state constitution under which it was granted providing that all such charters "may be altered or repealed at any time." [FIELD and STRONG, JJ., dissenting.] *Peik v. Chicago & Northwestern Railway Co.*, 94 U. S. 164; *Chicago, Milwaukee, & St. Paul Railroad Co. v. Ackley*, Id. 179. See *Stone v. Wisconsin*, Id. 181.

7. Nor is it as applied to a road in a state where by statute and by constitution the company is bound to carry on reasonable terms. [FIELD and STRONG, JJ., dissenting.] *Winona & St. Peter Railroad Co. v. Blake*, 94 U. S. 180; *Southern Minnesota Railroad Co. v. Coleman*, Id. 181.

8. Nor is it as applied to a road by its charter empowered, through its directors, to establish rates by by-laws not repugnant to the laws of the state. Such a provision gives no immunity from legislative control. *Ruggles v. Illinois*, 108 U. S. 526; *Illinois Central Railroad Co. v. Illinois*, Id. 541.



**RAILROAD—STATE REGULATION—continued.**

9. Where a railroad corporation having the right to charge such passenger rates as it deems reasonable, accepts the provisions of legislation permitting its consolidation with another company, the legislature, under a power given by a constitution adopted before the consolidation to alter and amend charters, may limit the rate, — as in this case, at three cents per mile. [FIELD and STRONG, JJ., dissenting, and denying the right of the legislature, under its reserved power, to take from the corporation the right to charge rates which it deems reasonable.] *Shields v. Ohio*, 95 U. S. 319.

10. Section 6, act of July 1, 1862 (12 Sts. 489), which requires the Union Pacific Railroad Company to transport the mails when required at fair and reasonable rates of compensation, not to exceed the amounts paid to private parties for the same kind of service, constitutes a contract; and the provisions of the statute giving the postmaster-general authority to fix the rates to be paid to land-grant companies have no application to this company. *Union Pacific Railroad Co. v. United States*, 104 U. S. 662.

11. — *Abandonment of Stations — Contract by Commissioners.* Where a statute prohibited the abandonment of railroad stations except by approval of the railroad commissioners, and the commissioners authorized the abandonment of two stations on the erection of certain structures at another point, it was held that there was no contract precluding the legislature from compelling the company to stop its trains at one of the stations thus abandoned. *New Haven & Northampton Co. v. Hamersley*, 104 U. S. 1.

*License Fee — Power of State to increase.*

See CORPORATION — CHARTER, 45.

*Municipal Power to regulate.*

See MUNICIPAL CORPORATION — POWERS IN GENERAL, 23, 24.

*Rates for Transportation — Consolidation.*

See RAILROAD — CONSOLIDATION, 8, 9.

**RATIFICATION—Act of Agent—In general.**

See AGENCY, 34 *et seq.*

*Contract — Illegal — Validation.*

See CONTRACT — WHAT CONSTITUTES, 80.

*Corporation — Ratification of Act done before Organization.*

See CORPORATION — POWERS AND LIABILITIES, 30.

*Deed of Infant — Solemnity necessary.*

See INFANCY, 9, 10.

*Municipal Bonds — In general.*

See MUNICIPAL BONDS — IN GENERAL, 113-133.

**REAL-ESTATE AGENT—In general.**

See BROKER, 1, 2.

**REASONABLE TIME—Abandonment to Insurer must be made within.**

See INSURANCE — MARINE, 114.

*Demand for Payment of Negotiable Paper payable on Demand.*

See NEGOTIABLE INSTRUMENT, 2.

*Promise to perform in Reasonable Time—No Evidence but Written Promise—Question for Court.*

See JURY, 22.

*Question of Law, when—When mixed of Law and Fact.*

See ACCOUNT STATED, 5.

*Repudiation by Corporation of Voidable Transaction—When exercised within.*

See CORPORATION — OFFICERS, 9, 10.

*Verdicts and Judgments amended within Reasonable Time.*

See JUDGMENT — RENDITION AND ENTRY, 21.

*What is—In general.*

See CONTRACT — CONSTRUCTION, 42; TIME.

*What is, Question for Jury.*

See INSURANCE — MARINE, 159.

*Withdrawal of Property from Enemy's Country.*

See CAPTURE — LAWFUL PRIZE, 3.

**REBELLION—Power of the Sovereign—Belligerent Rights—Right of Arrest and Right of Search—Status of Citizens of Rebel Territory—Military Occupation.**

See pl. 1-10.

*War of Rebellion a Public War—When it began and ended—Exemption of Government Agents from Liability for Acts done in its Suppression, etc.*

See pl. 11-20.

1. — *Power of the Sovereign—Belligerent Rights—Right of Arrest and Right of Search—Status of Citizens of Rebel Territory—Military Occupation.* A sovereign, in reducing his revolted subjects to obedience, may have belligerent rights, as well as the rights of sovereignty. To rights of which class any particular act is to be referred, must be determined by the nature of the law and the proceedings thereunder. *Rose v. Himely*, 4 Cranch, 241.

2. Where civil war exists, hostilities may be prosecuted on the footing of hostilities against a foreign enemy. *The Amy Warwick*, 2 Black, 635; *The Hiawatha*, Id.; *The Brillante*, Id.; *The Crenshaw*, Id.

3. And it makes no difference that the government is still sovereign and may punish the rebels, as criminals, — the government being at liberty to exercise the rights arising from a state of war instead of its right of sovereignty, if it choose to do so. *Id.*

**REBELLION — continued.**

4. In the enforcement of its constitutional rights against armed insurrection, the federal government has the powers not only of a sovereign, but of the most favored belligerent, and may accordingly enforce its authority by capture. *Lamar v. Browne*, 92 U. S. 187.

5. Thus, in the war of the rebellion the United States had belligerent as well as sovereign rights, — a right, therefore, to confiscate the property, wherever found, of persons inhabiting rebel territory, not less than that of rebels in arms, as being the property of public enemies, as well as the right to punish offences against its sovereignty. [FIELD and CLIFFORD, JJ., dissenting.] *Miller v. United States*, 11 Wal. 268; *Tyler v. Defrees*, Id. 331.

6. The authority of the government to suppress rebellion is found in the power to suppress insurrection and carry on war. *Texas v. White*, 7 Wal. 700.

7. Martial law having been declared in a state, a military officer in its service may lawfully arrest any one whom, on reasonable grounds, he believes to be engaged in the insurrection, and may order a house in which, on like grounds, he believes him to be concealed to be forcibly entered and searched, if he use no unnecessary force, and do not exercise his power for the purpose of oppression. *Luther v. Borden*, 7 How. 1.

8. All the people of any district in insurrection against the general government, there being a state of war, are to be deemed enemies, except so far as such relation is altered by the action of the government, — the principle of ignoring distinctions based on the inclinations of different inhabitants of the enemy's country applying in civil as well as in other wars. *United States v. Alexander's Cotton*, 2 Wal. 404.

9. Loyal citizens of the United States resident in the south at the outbreak of the rebellion, who escaped and afterwards resided elsewhere, did not lose their rights by reason of a constrained and temporary residence there after the beginning of hostilities. *The Peterhoff*, 5 Wal. 28.

10. The occupation of rebel territory by the federal forces, if actual, complete, and permanent, drew after it, as indicated by the president's proclamations of August 16, 1861, and March 3, 1863, the full measure of protection to persons and property, consistent with a necessary submission to military government. *The Venice*, 2 Wal. 258.

11. — *War of Rebellion a Public War — When it began and ended — Exemption of Government Agents from Liability for Acts done in its Suppression.* The war of the rebellion was a public war. *United States v. Thomas*, 15 Wal. 337.

12. And is deemed to have begun as to some of the states on the date of the executive proclamation of blockade of April 19, 1861, and as to others on the date of the proclamation of April 27, and to have ended as to some on the

**REBELLION — continued.**

date of the proclamation of April 2, 1866, and as to others on the date of the proclamation of August 20. *The Protector*, 12 Wal. 700; *Adger v. Alston*, 15 Wal. 555.

13. The acts of March 3, 1863 (12 Sts. 756), and May 11, 1866 (14 Sts. 46), extend protection to all persons for acts committed in subordination to the military authorities engaged in conducting the war, and confer on them the same exemption from liability which belonged to the president, the secretary of war, and the department commanders. *Beard v. Burts*, 95 U. S. 434.

14. These acts apply to wrongs against property as well as wrongs against the person, and, therefore, embrace the case of a citizen of St. Louis, who, in an action for rent due, in 1862, under a lease of property there situated, defends on the ground that he was compelled by the general commanding the military department to pay over the amount to the use of the United States. [FIELD, J., dissenting.] *Mitchell v. Clark*, 110 U. S. 633.

15. And the plea, setting up such defence, is not bad because it fails to set out a copy of the order on which the defence is founded, or its substance. *Id.*

16. The acts embrace also the case of a United States treasury agent who took possession of cotton brought, under the authority of the act of July 2, 1864 (13 Sts. 375), from an insurrectionary state, and who exacted one fourth of the New York market value before releasing it, notwithstanding the contention of the owner that, by reason of an executive proclamation, the power to enforce such exaction no longer existed. *Culler v. Kouns*, 110 U. S. 720.

17. A treasury agent to whom was turned over cotton taken by the military forces from hostile possession after the cessation of active hostilities in Georgia during the late war, was held not to be liable to the owner of the cotton, because acting for the government, and therefore protected by its authority. [FIELD, J., dissenting, on the ground that, at the time the cotton was so turned over, the agent was without authority to receive it.] *Lamar v. Browne*, 92 U. S. 187.

18. An act which, like the act of 1863, ratifies what has been done by persons acting during the war under color of authority, and declares that no suit shall be sustained against them, is valid, so far as congress could, before the event, have conferred the authority. *Mitchell v. Clark*, 110 U. S. 633.

19. A military order under which one seeks to justify when sued for cutting wood on the plaintiff's land during the war is not the less an order because permissive in form instead of mandatory. *Beard v. Burts*, 95 U. S. 434.

20. *Prima facie*, such an order signed by one as "wood agent," and purporting to give authority to cut wood for military purposes, is sufficient to afford protection to the party acting under it. *Id.*

**REBELLION** — *continued.*

*Abandoned and Captured Property — Disposal.*

See ABANDONED AND CAPTURED PROPERTY.

*Aliens embraced in Amnesty Proclamation of 1868.*

See ALIEN, 12.

*Authority of General Government to set up New State Governments.*

See UNITED STATES — IN GENERAL, 4 *et seq.*

*Challenge of Jury on Account of Aid to Rebellion — Right of Government alone.*

See JURY, 6.

*Claims arising out of the War — Liability of Government.*

See COURT OF CLAIMS — JURISDICTION.

*Confederacy — In general.*

See CONFEDERACY.

*Confiscation of Property of Persons engaged in Rebellion.*

See CONFISCATION.

*Contracts — Effect of the Rebellion thereon.*

See CONTRACT — WHAT CONSTITUTES, 48 *et seq.*

*Contracts made during Rebellion — In what Money solvable.*

See CONTRACT — CONSTRUCTION, 24-30.

*Contracts — Rebellion as affecting Legality.*

See CONTRACT — WHAT CONSTITUTES, 49 *et seq.*

*Cotton Proper Subject of Capture.*

See CAPTURE — LAWFUL PRIZE.

*Foreclosure Proceedings taken during the War and while the Mortgagor was in Confederacy — Effect.*

See MORTGAGE — FORECLOSURE, 52, 53.

*Judgments in Southern Courts — Rebellion affecting.*

See CIRCUIT COURT — PRACTICE, 15.

*Limitation — Suspension of Statute limiting the Right of Appeal.*

See APPEAL — TAKING AND PERFECTING, 20, 21.

*Limitation — Suspension of Statutes during the Rebellion — Valid Exercise of War Power.*

See LIMITATION — EXCEPTIONS AND INTERRUPTIONS, 50 *et seq.*

*Neutrals — Property of Neutrals resident South — Enemy's Property, etc.*

See CAPTURE — LAWFUL PRIZE.

*Neutrals — Vessels of Neutrals domiciled South.*

See CAPTURE — LAWFUL PRIZE.

*Participation by Attorney — Pardon.*

See PARDON, 8.

**REBELLION** — *continued.*

*Participation as affecting Redemption of Land sold for Direct Taxes under Act of 1861.*

See DIRECT TAX.

*Participation, etc. — Oath denying.*

See TEST OATH.

*President — Power to act with Reference thereto.*

See PRESIDENT, 1, 2.

*Provisional Courts — Erection.*

See PROVISIONAL COURT.

*Provisional Governments — Erection.*

See PROVISIONAL GOVERNMENT.

*Removal of Causes for Acts done by Government Agents, etc., during the Rebellion.*

See REMOVAL OF CAUSES, 6 *et seq.*

*Rights, Obligations, etc., of States as affected by.*

See STATES — RIGHTS AND POWERS, 19 *et seq.*

*Sales of State Property by State in Rebellion.*

See GOVERNMENT BONDS, 5 *et seq.*

*Suppression — When complete.*

See ABANDONED AND CAPTURED PROPERTY, 25.

*Suspension of Commercial Intercourse — License to trade.*

See TRADING WITH ENEMY.

**RECEIPT** — *Explanation by Parol Evidence.*

See EVIDENCE — EXTRINSIC OR PAROL.

*Warehouseman's — When given — Effect.*

See WAREHOUSEMAN, 2, 3.

*What constitutes.*

See VOLUNTARY ASSOCIATION.

**RECEIVER** — *Appointment — When Receiver will be appointed — Powers and Liabilities, in general — Liability to suit, etc. — Sales* ] The appointment or discharge of a receiver, although generally a matter resting in the discretion of the court below, is not such always and absolutely. *Milwaukee & Minnesota Railroad Co. v. Soutter*, 9 Wal. 510.

2. Where a judgment has been rendered against a bridge corporation and execution returned *nulla bona*, a court of equity may appoint a receiver to collect the tolls and pay them into court to answer the demand of the judgment creditor. *Conington Drawbridge Co. v. Shepherd*, 21 How. 112.

3. If the supreme court, in any case, will appoint a receiver pending an appeal, it will not do so at the instance of a corporation seeking to set aside foreclosure proceedings authorized by the directors, where the decree was by consent, and the sale, although in form to the attorney of the corporation, was in reality to the bondholders in whose interest the foreclosure was had, and where the pleadings fail to disclose the defence which

**RECEIVER — continued.**

is to be made. *Missouri Pacific Railroad Co. v. Kelchum*, 95 U. S. 1.

4. A judgment creditor having a lien on land in possession of a receiver appointed under a bill by another creditor against the debtor and a third person, to set aside a conveyance to the latter as a fraud upon creditors, cannot proceed to levy his execution, if he have notice of such possession, but must apply to the court of chancery for the protection of his interests. *Wiswall v. Sampson*, 14 How. 52.

5. The rule that want of leave of the court by which he was appointed is a bar to a suit against a receiver, applies not only where the suit is for specific property, but where it is on a money demand. And it makes no difference to its application that the suit is a suit brought to the court of another jurisdiction against a receiver operating a railroad, for injuries caused by his negligence or the negligence of his servants in conducting the business of a carrier of passengers; nor that the result of its application is to deprive the injured person of a trial by jury. [MILLER, J., dissenting.] *Barton v. Barbour*, 104 U. S. 126.

6. A court of equity may authorize a receiver of a railroad company to sue in his own name so that he may maintain a bill therein to enjoin the officers of the state by which a grant of land to the company has been declared forfeited, from granting the land to settlers. *Davis v. Gray*, 16 Wal. 203.

7. The powers of a receiver are to be interpreted liberally in aid of the jurisdiction of the court. *Ib.*

8. A receiver is but an officer of the court that appoints him, and cannot sue in a foreign jurisdiction for the property of the debtor. *Booth v. Clark*, 17 How. 322.

9. The appointment of a receiver under a creditor's bill against a resident of the state, does not vest in the receiver a claim of the debtor against a foreign government. *Ib.*

10. A receiver, as such, has no authority to incur expenses on account of the property beyond what are absolutely necessary to its preservation and use, as contemplated in his appointment, — none, *e. g.*, where the property is a railroad, to incur expenses in defeating a subsidy proposed to aid in the construction of a rival road. *Cowdrey v. Galveston, Houston, & Henderson Railroad Co.*, 93 U. S. 352.

11. Funds in the hands of a receiver appointed in a suit to foreclose a mortgage from which the funds are derived, are chargeable with the fee due an attorney for services rendered in a prior foreclosure suit brought by trustees of the mortgaged property, but interrupted by the civil war, although the trustees have since died, and the suit prosecuted to judgment was brought by the *cestuis que trust*. *Ib.*

12. A receiver can be held liable for not delivering to the successful party only when a copy of the decree was produced and a receipt ten-

**RECEIVER — continued.**

dered when the demand for delivery was made. *Very v. Watkins*, 23 How. 469.

13. A receiver who refuses to give information when questioned as to the use made of certain money transferred by him to his private account, is properly charged for the use thereof. *Hinckley v. Gilman, Clinton, & Springfield Railroad Co.*, 100 U. S. 153.

14. Where, in a suit removed to the circuit court, a receiver appointed by the state court voluntarily reports to the circuit court, states the amount of the fund in his hands, and asks for leave to make certain payments, the circuit court may compel him to account. *Ib.*

15. Although a receiver authorized to sell should not convey until the sale has been confirmed by the court, a deed executed before confirmation will pass title, if confirmation follow. *Koontz v. Kentucky Northern Bank*, 16 Wal. 196.

16. A purchaser from a receiver is not bound to examine all the proceedings in the case to inquire for errors in the action of the court or irregularities in the conduct of the receiver, but only to see that there is a suit in which there is a receiver authorized to sell, that a sale is made under the authority and confirmed by the court, and that the deed accurately describes the property sold. *Ib.*

17. Where the receiver's authority to sell prescribes certain conditions, as, for instance, that if the sale be on credit he shall retain a lien for the purchase-money, if he so report a sale as to deceive the court as to compliance with such conditions, and the purchaser participate in the deception, the court may set the proceedings aside, although the sale has been confirmed and conveyance made, the rights of third parties not having intervened; but if such rights have intervened, the party injured must resort to his action against the receiver, or to an action on his bond. *Ib.*

*Appeal from Decree fixing Sum due from him in Foreclosure Suit.*

See APPEAL — TAKING AND PERFECTING, 10.

*Appointed by State Court not liable in that Capacity in Circuit Court in another State.*

See COURT — IN GENERAL, 53.

*Appointment — Agreement therefor.*

See TRIAL — REGULATION OF TRIALS, 4.

*Appointment — Receiver of Confiscated Lands when the Holder refuses to pay the Taxes.*

See EQUITY — JURISDICTION, 48.

*Appointment — Power of Judge in Illinois to appoint Receiver in Vacation.*

See COURT — IN GENERAL, 4.

*National Bank — In general.*

See NATIONAL BANK.

*Power of Court to collect Taxes through Receiver.*

See MUNICIPAL CORPORATION — LIABILITY, 30, 31.

**RECEIVER — continued.**

*Power to pay over Fund in Controversy notwithstanding Appeal.*

See **APPEAL — TAKING AND PERFECTING**, 78.

*Property held by Receiver pendente Lite subject to Execution as Property of Party, when Party by Decree has Title.*

See **EXECUTION**, 14.

*Railroads — In general — Appointment — Powers and Duties, etc.*

See **RAILROAD — MORTGAGE**, 49 *et seq.*

**RECEIVER OF PUBLIC MONEY — When liable — What excuses from Liability — How Liability may be enforced — Treasury Distress-Warrant — Liability of Debtor for Interest — Release of Sureties on Bond — Embezzlement, Construction of Statutes relating to.**

See pl. 1-27.

*Right, when sued, to claim Credits — Claim must have been presented to Accounting Officers and passed upon.*

See pl. 28-45.

*Effect as Evidence of Adjustment of Accounts by Government Auditing Officers, and of Treasury Transcripts.*

See pl. 46-71.

*Compensation.*

See pl. 72.

1. — *When liable — What excuses from Liability — How Liability may be enforced — Treasury Distress-Warrant — Liability of Debtor for Interest — Release of Sureties on Bond — Embezzlement, Construction of Statutes relating to.* A manufacturer who buys stamps at a discount on credit, giving the bond required by Rev. Sts., § 3425, as security, is not a "person accountable for public money" who, under section 3624, forfeits commissions if suit is brought and judgment recovered against him. His discount is not a "commission," nor has he, in a legal sense, any money belonging to the United States. *United States v. Goldback*, 102 U. S. 623.

2. A navy agent who pays claims for a purser without a regular requisition, and permits the purser to take the vouchers therefor and to obtain credit therefor at the treasury, without a credit to such agent and a charge to himself, must look to the purser and not to the government for indemnity. *United States v. Hawkins*, 10 Pet. 125.

3. The sureties of a purser stationed at a navy yard are liable for the default of their principal in failing to account for money remitted to him as purser, although it would have been remitted to the navy agent for disbursement had there been one. *Strong v. United States*, 6 Wal. 788.

4. The provisions of the act of April 24, 1816,

**RECEIVER OF PUBLIC MONEY — continued.**

§ 4 (3 Sts. 298), directing that paymasters appointed thereunder shall be recalled in default of periodical settlements, are directory merely, and form no part of the contract of the government with the surety on the paymaster's bond. *United States v. Vanzandt*, 11 Wheat. 184.

5. The giving of a bond is not a condition precedent to the authority of a paymaster to act, the appointment being complete when made by the president and confirmed by the senate. *United States v. Bradley*, 10 Pet. 343.

6. The act of 1816 does not prohibit the taking of bonds from army paymasters in a form other than the one therein prescribed, if obtained without compulsion. *Ib.*

7. It is no defence to an action on the bond of a receiver of public money conditioned to safely keep the money collected, that the money was feloniously stolen without fault on his part. *United States v. Prescott*, 3 How. 578; *United States v. Morgan*, 11 How. 154; *United States v. Dashiell*, 4 Wal. 182; *United States v. Keebler*, 9 Wal. 83.

8. Or that it was taken from him by robbery. *Boyd v. United States*, 13 Wal. 17.

9. He is liable also for money which he has been compelled to pay to the usurping government of states in rebellion, where, had he paid it into the treasury seasonably, he would not have had it when so compelled, and where, therefore, he was already in default. [CHASE, C. J., and CLIFFORD, J., dissenting.] *Bevans v. United States*, 13 Wal. 56; *Halliburton v. United States*, *Id.* 63.

10. The payment by a public officer of money in his hands to a creditor of the United States, under an order of the confederate authorities, is no defence to an action on his official bond, no force or physical coercion compelling obedience to such order being shown. *United States v. Keebler*, 9 Wal. 83.

11. A receiver of public money is not liable on his bond for money of which he has been deprived by the act of God or the public enemy, without fault on his part, — money, *e. g.*, forcibly taken during the war by the rebel authorities. [SWAYNE, MILLER, and STRONG, JJ., dissenting.] *United States v. Thomas*, 15 Wal. 337.

12. The rules governing the bond, and the principles of the law of bailment, as the measure of liability in such cases, considered. *Ib.*

13. Where a receiver of public moneys in a land district charges himself with money received by himself or his authorized agents as the purchase price of public lands entered pursuant to the pre-emption laws, the sureties on his official bond, when sued because of his failure to pay over such money, cannot defeat a recovery by setting up irregularities in the proceedings relating to the entry of the land. *Potter v. United States*, 107 U. S. 126.

14. The act of March 3, 1795 (1 Sts. 441), for the recovery of debts due to the United

**RECEIVER OF PUBLIC MONEY — continued.**

States, is repealed by implication by the acts of March 3, 1797 (1 Sts. 512), and March 3, 1817 (3 Sts. 366). *Smith v. United States*, 5 Pet. 292.

15. The official bond of a receiver of public money is a mere collateral security, and does not operate as a merger of the simple contract arising from a balance due for money received. *Walton v. United States*, 9 Wheat. 651.

16. *Semble* that on his default assumpsit against him and debt on his bond may be maintained at the same time. *Ib.*

17. The United States may apply money due to an officer for pay and emoluments to the payment of a debt due from him to the government, such application being but an exercise of the common right belonging to every creditor, to apply unappropriated money of his debtor in his hands in extinguishment of the debt due him. *Gratiot v. United States*, 15 Pet. 336.

18. So the United States may retain, of a sum due on a government contract, the amount of the contractor's indebtedness as surety in an official bond, to await the final adjustment of the accounts of his principal. *McKnight v. United States*, 98 U. S. 179.

19. The act of May 15, 1820 (3 Sts. 592), authorizing the issue of treasury distress-warrants against the property of receivers of public money, etc., for the amount found due on adjusting their accounts in the treasury department, is not inconsistent with the separation of the judicial from the executive power, the issuing of such a warrant, although in some sense a judicial act, being in effect nothing more than an exercise of executive power, within the meaning of the constitution. *Murray v. Hoboken Land & Improvement Co.*, 18 How. 272.

20. And it makes no difference therein that congress may by consent authorize the defendant to bring the case, after levy, into a court for judicial investigation. *Ib.*

21. The act is not inconsistent with the fifth amendment to the constitution, prohibiting the deprivation of a citizen of his property without due process of law, such a warrant being "due process." *Ib.*

22. And although called a warrant, it is not a search-warrant within the meaning of the fourth amendment, and need not be issued on oath. *Ib.*

23. Proof, merely, of the receipt of public money by an officer charged with its disbursement, is not sufficient to charge him with interest, in the absence of evidence of a conversion or of a refusal to respond to a lawful requirement with regard to it. *United States v. Denver*, 106 U. S. 536.

24. The act of May 15, 1820 (3 Sts. 592), in relation to public debtors, does not discharge sureties on existing bonds, although it requires new sureties to be given. *United States v. Nicholl*, 12 Wheat. 505.

25. A private act for the relief of a public

**RECEIVER OF PUBLIC MONEY — continued.**

debtor, which retains the right to proceed against after-acquired property, will not release the debtor's sureties. *Hunter v. United States*, 5 Pet. 173.

26. A clerk appointed under the act of August 6, 1846 (9 Sts. 59), by an assistant treasurer of the United States, with a prescribed salary, a tenure of place independent of that of his superior, and duties which, although to be prescribed by such superior, are continuing and permanent, is an officer within the meaning of the act, and as such liable to indictment for embezzlement under section 16. [GRIER, MILLER, and FIELD, JJ., dissenting, on the ground that to come within the act the person must be by statute directly and primarily liable to the government.] *United States v. Hartwell*, 6 Wal. 385.

27. The penalty for embezzlement prescribed by § 3, act of June 14, 1866 (14 Sts. 65), to regulate and secure the safe keeping of the public money, being by the concluding clause confined to persons of the classes therein named, i. e., officers of banks and banking associations, applies to such persons only, although the enacting clause in defining the act speak of it as committed by "any banker, broker, or any person not an authorized depository of public money." *Ib.*

28. — *Right, when sued, to claim Credits — Claim must have been presented to Accounting Officers and passed upon.* If a public debtor put claims due to himself into the hands of a public officer, to collect and apply the money on his indebtedness to the government, he is not entitled to credit therefor until the money is paid to the proper officer: receipt thereof by the agent of one who was such proper officer when the claims were placed for collection, but whose office became extinct before the agent received the money, will not do. *United States v. Patterson*, 7 Cranch, 575.

29. If the United States bring an action for money had and received, against one who has a legal claim for services rendered, he may set off such claim. *United States v. Ringgold*, 8 Pet. 150.

30. Under the act of March 3, 1797, §§ 3, 4 (1 Sts. 514), he is entitled, at the trial, to the benefit of any credit in his favor, arising either out of the transaction on which he is sued, or out of independent transactions, which would constitute a set-off, either legal or equitable, in whole or in part, to the debt sued for. *United States v. Wilkins*, 6 Wheat. 135.

31. In assumpsit by the government against a department clerk for money had and received, an equitable claim for services rendered to the government, under the orders of the head of the department, may be allowed by way of set-off, although there be no statute providing for the payment of such services. *United States v. Macdaniel*, 7 Pet. 1.

32. A person appointed secretary of the board of commissioners of the navy hospital fund, to

**RECEIVER OF PUBLIC MONEY — continued.**

perform such duties relative to the books, etc., of the fund as the board may require of him, for a fixed salary, and who performs extra services at the request of the board, with the understanding that he shall be paid such a commission as has been usually paid for like services, is entitled to an allowance of such extra compensation, by way of set-off, in an action against him by the government. *United States v. Fillebrown*, 7 Pet. 28.

33. The act of 1797 permitting set-offs in suits by the United States does not extend to claims for unliquidated damages. *United States v. Robeson*, 9 Pet. 319; *United States v. Buchanan*, 8 How. 83.

34. Nor to a claim of which the defendant is the equitable owner by assignment; and neither the practice of state courts nor the provisions of state laws as to set-off can affect the rule. *United States v. Robeson*, 9 Pet. 319.

35. In an action by the United States against one accountable for public money, a credit may be allowed which has been rejected by the accounting officers of the treasury. *United States v. Macdaniel*, 7 Pet. 1; *United States v. Ripley*, Id. 13.

36. But if the claim has not been presented to them and by them rejected, except in the cases of inability, accident, or absence provided for by statute, it cannot be allowed. *United States v. Giles*, 9 Cranch. 212; *United States v. Gilmore*, 7 Wal. 491; *Western Union Railroad Co. v. United States*, 101 U. S. 543.

37. Or except where the defendant shows that he is in possession of vouchers not before in his power to procure, etc., and a claim to be legally presented should be presented by items and with the proper vouchers. *Watkins v. United States*, 9 Wal. 759; *Halliburton v. United States*, 13 Wal. 63.

38. Nor can the sureties on his official bond claim it as a credit. *United States v. Giles*, 9 Cranch. 212.

39. It must be made to appear from the books of the treasury that it has been presented, and in whole or in part disallowed. *United States v. Gilmore*, 7 Wal. 491.

40. But it need not have been presented and rejected before the institution of the suit. *United States v. Hawkins*, 10 Pet. 125.

41. If proof of credits have been permitted to go to the jury without such a foundation first laid, it should be wholly withdrawn from their consideration. *United States v. Gilmore*, 7 Wal. 491.

42. Whether evidence in support of a claim for a credit is properly in the case by reason of proof that the claim has been presented and disallowed, is a question for the court. *Ib.*

43. Under the act of 1797, the defendant cannot have a continuance to enable him to present claims for credits to the treasury. *United States v. Hawkins*, 10 Pet. 125.

**RECEIVER OF PUBLIC MONEY — continued.**

44. A claim by a deputy postmaster which is but a claim for damages for being deprived of his office, and so of the emoluments thereof, is within the rule requiring presentment. *Ware v. United States*, 4 Wal. 617.

45. The presentation by a collector to the commissioner of internal revenue, of a claim for a credit, and its rejection by the commissioner, is such a presentation "to the accounting officers of the treasury for their examination" as to entitle the collector, when sued, to set up his claim. *United States v. Kimball*, 101 U. S. 726.

46. — *Effect as Evidence of Adjustment of Accounts by Government Auditing Officers, and of Treasury Transcripts.* Under the act of March 3, 1797, §§ 2, 4 (1 Sts. 512), a certified transcript from the books of the treasury is admissible in evidence in an action against a public debtor, although no previous proceedings have been had against him under the act of March 3, 1795 (1 Sts. 441), and although he be not declared against in his official character. *Walton v. United States*, 9 Wheat. 651.

47. Such transcript of an account stated at the treasury is evidence only of items for money disbursed through the ordinary channels, known officially to the accounting officers, and appearing on their books. *United States v. Buford*, 3 Pet. 12.

48. The signature of the secretary of the treasury is necessary to a treasury transcript, under the act of March 3, 1817 (8 Sts. 366), the seal of the department giving authenticity to the certificate. *Smith v. United States*, 5 Pet. 292.

49. A treasury transcript is evidence for the surety, to prove the date of a payment credited in the account with the principal. *Cox v. United States*, 6 Pet. 172.

50. Where copies, as, for instance, treasury transcripts, are made evidence by statute, the mode of authentication required must be strictly pursued. *Smith v. United States*, 5 Pet. 292.

51. Under the act of 1797 there should be annexed to the treasury transcript duly certified copies of the vouchers under which payments were made to third persons by authority of the debtor. *United States v. Jones*, 8 Pet. 375; *United States v. Jones*, Id. 387.

52. It is in the discretion of the court to require the production of the originals where fraud is alleged. *Ib.*

53. The act requires a transcript of the items, not a statement of a balance in gross. *Ib.*

54. The defending debtor may avail himself of the credits in the transcript without waiving any right he may have to object that certain items of debit are not properly provable thereby. *Ib.*; *United States v. Jones*, 8 Pet. 399.

55. Although a transcript stating balances merely is not evidence under the act of 1797, yet if the whole transcript, taken together, contains the items so as to show how the balances were struck and of what items composed, it is sufficient. *Gratiot v. United States*, 15 Pet. 336.

**RECEIVER OF PUBLIC MONEY — continued.**

56. A transcript is only *prima facie* evidence as against the sureties that the money with which the officer stands charged as of the term to which the liability of the sureties extends was in fact received in that term and not paid over. *United States v. Irving*, 1 How. 250.

57. A transcript which is a substantial copy of the collector's quarterly returns, revised and corrected by the accounting officers of the treasury, is evidence; and it is no objection that it contains charges which are aggregates of items in such returns, references being made to the returns, and the returns not being called for on the trial. *Hoyt v. United States*, 10 How. 109.

58. Under the act of July 2, 1836, §§ 8, 15 (5 Sts. 81, 82), transcripts of the quarterly returns of a postmaster, as corrected by the auditor, and of the accounts based thereon, are evidence against the postmaster and his sureties, although they do not exhibit credits claimed and rejected. *United States v. Hodge*, 13 How. 478.

59. A treasury transcript is evidence against the officer and his sureties that he received the several sums therein charged as received in the regular course of the business of the department, without production of copies of his receipts therefor. *Bruce v. United States*, 17 How. 437.

60. Unofficial letters of a subordinate officer of the treasury are inadmissible in a suit against a disbursing officer of the government for defalcation, to contradict or even to explain the official adjustment of his accounts as shown by the certified transcripts. *Strong v. United States*, 6 Wal. 788.

61. The private books of a disbursing agent of the government are inadmissible in a suit for defalcation to contradict the official adjustment of his accounts. *Ib.*

62. Under the act of 1797 it is not necessary that every account with any individual, and all of every account, be transcribed. A garbled or mutilated statement is not evidence, however. *United States v. Gausson*, 19 Wal. 198.

63. A transcript, duly certified and authenticated, constitutes evidence, *prima facie*, of the correctness of the balance therein claimed to be due; a mistake of computation may be corrected by a restatement of the account. *Soule v. United States*, 100 U. S. 8.

64. The adjustment of a collector's accounts by the treasury department affords *prima facie* evidence, not only of the fact and of the amount of the indebtedness, but also of the time when and the manner in which it arose. The sureties on his official bond, when sued, may show, of course, that the default charged occurred before their liability began. *United States v. Stone*, 106 U. S. 525.

65. To this end they may show that credits had been given their principal on a prior account, that belonged to subsequent ones, and that he had been debited in the latter with items improperly transferred from previous accounts. *Ib.*

**RECEIVER OF PUBLIC MONEY — continued.**

66. Where, in a suit on a collector's bond, transcripts of his accounts at the treasury department are offered in evidence by the United States, an objection, not arising on the face of the accounts, but only after a comparison between them and other accounts offered by the defendant, goes, not to the competency of the evidence, but only to its effect. *Ib.*

67. The provision of the act of 1797, declaring that "in every case of delinquency," where a suit is instituted to recover money due the United States, "a transcript from the books and proceedings of the treasury, certified," etc., shall be competent evidence, as well as copies of all bonds "relating to or connected with the settlement of any account between the United States and an individual," is general, and applies to all cases where the evidence is required. *Bechtel v. United States*, 101 U. S. 597.

68. The account of a delinquent revenue officer or other person accountable for public money, as finally adjusted at the treasury department, is not admissible in evidence under Rev. Sts. § 886, unless it be certified and authenticated to be a transcript from the books, etc., of the department. A certificate, therefore, which states that the transcript, to which the certificate is annexed, is a copy of the original on file is not sufficient, that being the form used in reference to mere copies of bonds, contracts, or other papers connected with the final adjustment. [SWAYNE and BRADLEY, JJ., dissenting.] *United States v. Pinson*, 103 U. S. 548.

69. A duly certified transcript from the treasury of the accounts of an internal revenue collector is admissible in evidence in a suit on his bond, even if certain items of the account are not chargeable on the bond in suit, if they may be separated and rejected; the transcript is none the less evidence because they are in it. *United States v. Hunt*, 105 U. S. 183.

70. A transcript from the books of the treasury, certified by the fourth auditor, showing the account of the treasury department with a paymaster of the navy, accompanied by a certificate of the secretary of the treasury that the certifying officer is the fourth auditor, is competent evidence in a suit on the paymaster's bond. It is clearly made so by Rev. Sts. § 886. *United States v. Bell*, 111 U. S. 477.

71. In a suit on a marshal's bond, the government may rest on the introduction of certified transcripts of the adjustment of his accounts by the accounting officers of the treasury; it need not show notice to the marshal of the adjustment or of the balance found due. *Watkins v. United States*, 9 Wal. 759.

72. — *Compensation.* Under the act of April 20, 1818 (3 Sts. 466), a receiver of public money is entitled to reckon his commissions as by years beginning with the date of his appointment to office, not by the fiscal year of the treasury. *United States v. Dickson*, 15 Pet. 141.



**RECEIVER OF PUBLIC MONEY** — *continued.*

*Actions against — Pleading and Evidence in.*

See ASSUMPSIT, 31, 38.

*Actions against — Exception to Treasury Transcripts — How taken.*

See EXCEPTIONS, 31.

*Actions by — May recover from United States Money paid over, when.*

See ASSUMPSIT, 29.

*Bonds thereof — In general.*

See BOND.

*Collector of Customs — Internal Revenue — In general.*

See COLLECTOR OF CUSTOMS; COLLECTOR OF INTERNAL REVENUE.

*Compensation — In general.*

See OFFICER.

*Compensation of Officers of Land Department.*

See LANDS OF UNITED STATES — LAND OFFICE.

*Compensation — Receiver for Land District employed in Sale of Indian Trust Lands.*

See OFFICER, 31.

*Construction of Statutes relating to Accounts.*

See STATUTES — CONSTRUCTION, 36, 37.

*Government's Right to Priority of Payment.*

See UNITED STATES — PRIORITY OF PAYMENT, 1 *et seq.*

*Land Office — In general — Powers, etc. — Compensation.*

See LANDS OF UNITED STATES — LAND OFFICE, 1 *et seq.*

*Right to sue Government in Court of Claims.*

See COURT OF CLAIMS — JURISDICTION, 29.

**RECEIVING STOLEN PROPERTY** — *Note stolen from Mail.*

See BILLS AND NOTES — IN GENERAL, 2.

**RECITAL** — *Deed — Recital as Evidence.*

See EVIDENCE — HEARSAY, 32.

*Letters-patent — Effect of Recitals.*

See PATENT — ISSUE, 48 *et seq.*

*Municipal Bonds — Recitals therein.*

See MUNICIPAL BONDS — IN GENERAL, 88-112.

*Patents for Public Lands — Effect.*

See LANDS OF UNITED STATES — PATENT, 21.

**RECLAMATION DISTRICT** — *Swamp Lands —*

*Reclamation — In general.*

See SWAMP LANDS.

**RECOGNIZANCE** — *In general.*

See BAIL.

**RECONSTRUCTION** — *Rights of Reconstructed State to State Property alienated during Rebellion — Adoption of New Constitution.*

See STATES — RIGHTS AND POWERS, 23 *et seq.*

**RECORD** — *Amendment — Courts may amend their Records at Subsequent Term.*

See COURT — IN GENERAL, 10.

*Appeal from Court of Claims — How Record should be prepared — No Evidence in Detail, but Facts.*

See APPEAL FROM COURT OF CLAIMS, 2-4.

*Appeal — What Record should contain — When Testimony should appear — On Feigned Issues — In Admiralty — The Account in Suit for Infringement.*

See APPEAL — TAKING AND PERFECTING, 85.

*Circuit Court — Jurisdiction as depending on Diversity of Citizenship — What Record should show.*

See CIRCUIT COURT — JURISDICTION, 154 *et seq.*

*Circuit Court — Need not show that Defendant was resident or found in the District.*

See CIRCUIT COURT — PRACTICE, 34.

*Copies of Records as Evidence.*

See EVIDENCE — PRIMARY AND SECONDARY, 32-37.

*Defective Record on Appeal — Certiorari.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 13 *et seq.*

*Error to State Court — What Record should show — Federal Question raised and decided.*

See ERROR TO STATE COURT — BRINGING AND PERFECTING, 16 *et seq.*

*Evidence — Record, when admissible — Proof.*

See EVIDENCE — DOCUMENTARY.

*Evidence to prove Spanish and Mexican Grants of Lands in Florida, Louisiana, California, etc.*

See LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS, 172 *et seq.*

*Land Office — In general — What constitutes — Effect.*

See LANDS OF UNITED STATES — LAND OFFICE, 47 *et seq.*

*Lost Record — Leave to supply — Matter of Discretion.*

See APPEAL AND ERROR — JURISDICTION, 39.

*Mexican Archives, Public Records.*

See EVIDENCE — JUDICIAL NOTICE, 6.

*Nul Tiel Record — Evidence admissible under.*

See PLEADING — PLEA TO MERITS, 12.

*Surveys of Lands of Virginia and Kentucky.*

See LANDS OF STATES — VIRGINIA AND KENTUCKY.

*Transcript on Appeal — Filing — Withdrawal.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 1 *et seq.*

**RECORD** — *continued.*

*Transcript — Want of, Ground for Dismissal of Appeal or Writ of Error.*

See **APPEAL AND ERROR** — **PROCEEDINGS** ABOVE, 105 *et seq.*

*Transcription and Certification of Record on Appeal.*

See **APPEAL** — **TAKING AND PERFECTING**, 81.

*Validity not open to Denial.*

See **PLEADING** — **GENERAL RULES**, 2.

*Verification on Error — What Record should contain.*

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*What a Part of on Appeal or Error — In general.*

See **APPEAL AND ERROR** — **PROCEEDINGS** ABOVE, 27 *et seq.*

*What a Part of on Appeal or Error from Louisiana.*

See **APPEAL AND ERROR** — **PROCEEDINGS** ABOVE, 344.

*What a Part of the Record.*

See **EVIDENCE** — **DOCUMENTARY**.

*What constitutes — Pleadings and Decree in Equity.*

See **EQUITY** — **DECREE**, 1.

*What Part of Record on Error to State Court.*

See **ERROR TO STATE COURT** — **PROCEEDINGS** ABOVE, 1 *et seq.*

**RECORDING** — *In general.*

See **REGISTRATION**.

**RECOUPMENT** — *Where the Defendant may recoup.* In assumpsit for money had and received for the proceeds of goods purchased by the plaintiff for the defendant in violation of orders, but received and sold by the defendant, the defendant cannot recoup damages for such violation of orders. *Willinks v. Hollingsworth*, 6 Wheat. 240.

2. In special assumpsit, the defendant may recoup any damages he may have sustained by reason of the plaintiff's deviation from the contract, whether as to time or manner of performance, if not induced by himself. *Dermott v. Jones*, 2 Wal. 1.

3. Thus, in assumpsit by a contractor who has failed to perform within the contract period, but who has continued to work afterward and whose work has been accepted, the defendant may recoup the damages sustained through the failure of the plaintiff to perform in the time agreed, and need not resort to an original action to recover them. *Ib.*

4. In an action brought to recover the contract price for doing a certain piece of work, *e. g.*, building a bridge, a ruling which excludes evidence offered by the defendant to show that the work was imperfectly done, and in effect

**RECOUPMENT** — *continued.*

denies the right of the defendant to set up damages sustained by way of recoupment, is erroneous. *Florida Railroad Co. v. Smith*, 21 Wal. 255.

*When Defendant may recoup.*

See **CONTRACT** — **MODIFICATION AND MERGER**, 4.

**REDEMPTION** — *Confiscated Property — What Owner must show.*

See **CONFISCATION**, 6.

*Land sold for Direct Taxes under Act of 1862.*

See **DIRECT TAX**, 14 *et seq.*

*Land sold for Taxes.*

See **TAX** — **COLLECTION**, 41 *et seq.*

*Property sold on Foreclosure.*

See **MORTGAGE** — **REDEMPTION**.

**REFERENCE** — *Court of Claims may refer Complicated Accounts.*

See **COURT OF CLAIMS** — **PRACTICE**, 7.

*In general.*

See **ARBITRATION AND REFERENCE**.

*Master to state Account — Not final for Purposes of Appeal.*

See **APPEAL AND ERROR** — **JURISDICTION**, 192 *et seq.*

*Report — Objections not made below not open on Error.*

See **APPEAL AND ERROR** — **PROCEEDINGS** ABOVE, 279.

*Report — Review of General Findings.*

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*Supreme Court — Original Jurisdiction in Equity — Reference to Commissioners for Further Proof.*

See **SUPREME COURT** — **PRACTICE**, 3.

**REFORMATION** — *Deed cannot be reformed in an Action at Law in a Circuit Court for Possession of the Land.*

See **EJECTMENT** — **IN GENERAL**, 7.

*Insurance Policies — When reformed, etc.*

See **INSURANCE**.

*Written Instrument — Reformation in Equity.*

See **EQUITY** — **JURISDICTION**, 104 *et seq.*

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See **WITNESS** — **EXAMINATION**.

**REGISTER** — *Bankruptcy — In general.*

See **BANKRUPTCY**.

*Land Office — In general — Powers, etc. — Compensation.*

See **LANDS OF UNITED STATES** — **LAND OFFICE**, 1 *et seq.*

**REGISTRATION** — *Chattel Mortgages* — *Priority* — *Various Cases*.See CHATTEL MORTGAGE, 5 *et seq.**Deed* — *In general*.

See DEED — REGISTRATION AND NOTICE.

*Deed of Marriage Settlement*.See MARRIAGE SETTLEMENT, 2 *et seq.**Homestead* — *Registration affecting Right thereto* — *Actual Notice*.

See HOMESTEAD, 2.

*Lien of Seller of Personalty for Purchase-money* — *How affected by Registration*.

See SALE — SELLER'S LIEN.

*Mortgages, etc.* — *Registration affecting Priorities*.See MORTGAGE — PRIORITY, 10 *et seq.**Mortgages* — *Registration affecting Validity*.

See MORTGAGE — VALIDITY, 4.

*Municipal Bonds* — *In general*.

See MUNICIPAL BONDS — IN GENERAL, 39-43.

*Polygamists* — *In general*.

See ELECTIONS, 2.

*Sale of Chattels*.See SALE — WHAT CONSTITUTES, 27 *et seq.**Vessels* — *In general*.

See SHIPPING — REGULATION.

*Voters* — *Officers liable to an Action for wrongfully refusing to allow a Qualified Voter to Register*.

See ELECTIONS, 1, 3.

*Wills* — *Where recorded*.

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**REHEARING** — *Allowed after Allowance of Appeal, when*.

See COURT — IN GENERAL, 18.

*English Chancery Rules respecting, inapplicable in Appellate Court*.

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*Equity* — *In general*.

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See NEW TRIAL.

*Remission of Record by Supreme Court for Rehearing*.

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 489, 490.

*Supreme Court* — *Rehearing* — *Constitutional Questions*.See SUPREME COURT — PRACTICE, 34 *et seq.***REINSTATEMENT** — *Cause* — *After Nonsuit* — *Matter of Discretion and not assignable for Error*.

See JUDGMENT — OPENING AND REVERSAL, 3.

**REINSTATEMENT** — *continued*.*Cause will be reinstated in Appellate Court, when* — *Appeal* — *Writ of Error* — *Motion, when made* — *Matter of Discretion*.See APPEAL AND ERROR — PROCEEDINGS ABOVE, 201 *et seq.***REINSURANCE** — *In general*.

See INSURANCE.

**REISSUE** — *Letters-patent* — *In general*.

See PATENT — REISSUE.

**RELEASE** — *What constitutes* — *Effect* — *Failure of Consideration*.] A release not under seal is not a bar, even at law; and when sealed it cannot be set up in equity against those who were not parties, and who had separate interests. *Oelrichs v. Spain*, 15 Wal. 211.2. Where the act forming the consideration for a release is wholly executory and is never performed, the performance failing, the agreement to release goes with it. *Memphis v. Brown*, 20 Wal. 289.3. If the consideration of a release be the settlement of an account, and the settlement be successfully impeached, the release can have no effect in equity. *Kelsey v. Hobby*, 16 Pet. 269.4. A conveyance of the naked legal title to the equitable owner, by a mere deed of release, without words of inheritance, will pass the title, although executed on partition between tenants in common. *Webb v. Weatherhead*, 17 How. 576.*In general*.

See ACCORD AND SATISFACTION; COMPOSITION WITH CREDITORS.

*Wife's Right of Dower*.

See DOWER.

**RELIGION** — *Establishment under Constitution* — *Mormonism*.

See CONSTITUTION, 8.

**RELIGIOUS LIBERTY** — *Louisiana* — *Under Ordinance of 1787 and under State Constitution, etc.*

See LOUISIANA, 3, 4.

**RELIGIOUS SOCIETIES** — *Adoption by Various States of the English Religious Establishment, etc.* — *Right to the Glebe* — *State Statutes* — *Gifts and Grants to the Church*. See pl. 1-17.*Who constitute or represent other Religious Societies for the holding of Property* — *Power of the Courts to inquire in Respect thereto* — *Miscellaneous Matters*.

See pl. 18-31.

1. — *Adoption by Various States of the English Religious Establishment, etc.* — *Right to the Glebe* — *State Statutes* — *Gifts and Grants to the Church*.] The religious establishment of

**RELIGIOUS SOCIETIES — continued.**

England was adopted by the colony of Virginia, together with the common law of that subject, so far as it was applicable, in the circumstances of the colony. *Terrett v. Taylor*, 9 Cranch, 43.

2. The Virginia statute of 1776 confirming to the church its rights in lands was not inconsistent with the state constitution or the state bill of rights. *Ib.*

3. The statutes of 1784 and 1785 did not infringe any of the rights, whether civil, political, or religious, intended to be secured under the constitution of the state. *Ib.*

4. The statutes of 1798 and 1801, so far as they sought to divest the church of the property acquired before the revolution, either by purchase or donation, were unconstitutional, and therefore void. *Ib.*

5. The statute of 1798 merely repealed the statutes respecting the church passed since the revolution, and left all acts previously passed in full operation, so far as not inconsistent with the present constitution. *Ib.*

6. The common law relating to the erection of Episcopal churches, the right to present or collate, and the corporate capacity of the parsons to take in succession, was adopted in New Hampshire. *Pawlet v. Clark*, 9 Cranch, 292.

7. It belonged exclusively to the crown to erect in each town the church that should be entitled to take the glebe, and thereupon, through the governor, to collate a parson to the benefice. *Ib.*

8. A voluntary society of Episcopalians in a town, unauthorized by the crown, could not entitle itself to the glebe. *Ib.*

9. Where no such church was erected by the crown, the glebe remained as *hereditas jacens*, and the state, which succeeded to the rights of the crown, might, with the assent of the town, alien or incumber it; or might erect an Episcopal church therein, and collate, either directly or through the vote of the town, its parson, who would thereupon become seised thereof *jure ecclesiae*, as a corporation sole. *Ib.*

10. Parishioners have individually no right or title to the glebe. It is the property of the parish, and to be disposed of by the vestry for parochial purposes. *Mason v. Muncaster*, 9 Wheat. 445.

11. Church lands cannot be sold without the joint consent of the parson, if there be one, and the vestry. The freehold is in the parson. *Terrett v. Taylor*, 9 Cranch, 43.

12. By the Vermont statute of October 30, 1794, the towns became entitled to the glebes therein. *Pawlet v. Clark*, 9 Cranch, 292.

13. No Episcopal church in that state can be entitled to the glebe, unless duly erected by the crown or the state. *Ib.*

14. The Church of England is not a body corporate, and cannot receive a gift *eo nomine*. *Ib.*

15. A grant to the church of a particular place is good at common law, and vests the fee in the parson and his successors. *Ib.*

**RELIGIOUS SOCIETIES — continued.**

16. If such a grant be made by the crown, the crown cannot resume it at pleasure. *Ib.*

17. Church-wardens are not a corporation for the holding of lands. *Terrett v. Taylor*, 9 Cranch, 43.

18. — *Who constitute or represent other Religious Societies for the holding of Property — Power of the Courts to inquire in Respect thereto — Miscellaneous Matters.* In a church where the congregational form of government prevails, the majority, if they adhere to the organization and the doctrines, represent the church. *Bouldin v. Alexander*, 15 Wal. 131.

19. If a majority of the congregation be expelled and illegally excluded from the church, the mere fact that they meet and hold services in another church, still retaining their original organization, with the same trustees and deacons, is not a relinquishment of their right to the church property. *Ib.*

20. Where property is conveyed in trust for the use of a Baptist church, the trustees are not removable at the will of the *cestui que trust*, and without cause shown. *Ib.*

21. In that church, where the trustees of the church property are not necessarily church members, excommunication, even if regular, will not disqualify them, — certainly not an excommunication by a usurping minority, without charges, citation, or trial, and in contravention of the church rules. *Ib.*

22. The general conference of the Methodist Episcopal Church, in 1844, had power to consent to the division of the church into two bodies, so that the separation of the church south was not a mere secession of a part of the travelling preachers, but a division pursuant to proper authority. *Smith v. Swormstedt*, 16 How. 288.

23. That division carried with it, as matter of law, a division of the property held in common by the travelling preachers, as such, including the Book Concern, which belonged to the general church. *Ib.*

24. After that division, certain of the travelling preachers of the church south, acting by authority and under the direction of that branch of the church, had power to maintain a bill in behalf of themselves and others in like interest, against the trustees of the Book Concern, for division of the property, and to receive the proper share thereof. *Ib.*

25. The resolution of the general conference recommending that the annual conferences authorize a change in the sixth restrictive article, which provided that the general conference should not appropriate the profits of the Book Concern to any purpose except the benefit of travelling ministers, etc., did not intend the removal of that article to be a condition to the enjoyment by the church south of its share of the common fund, but only a step in a plan to enable the general conference to effect a division. *Ib.*

26. *Semble* that where property held by an

**RELIGIOUS SOCIETIES** — *continued.*

ecclesiastical body is held under an instrument which expressly devotes it to the support of some specific religion, doctrine, or belief, and not for the general use of the society for religious purposes, a court of equity may inquire into the religious faith or practice of those who claim its control, whenever it is necessary to protect the trust. *Watson v. Jones*, 13 Wal. 679.

27. And it seems that where the property was acquired in the ordinary way of gift or purchase, and there is a question of right thereto by succession, the court may inquire who constitute the society; and that, where the society is an independent one, that is to be determined by the ordinary principles which govern in cases of voluntary associations, by an ascertainment of the position of the majority of members, of officers having power of control, etc. *Ib.*

28. But where the society is a subordinate part of a general religious organization, with established tribunals for ecclesiastical government, and the right of this or that party as the true society to property so acquired depends on a question of doctrine or discipline, a decision of that question by the highest tribunal of the organization to which it has been carried will be deemed conclusive, and will be applied by the court in a controversy over the right to the property. *Ib.*

29. Where one is excommunicated by competent church authority, although the court will not go behind that authority and inquire whether the excommunication was regular, it may inquire whether the act was that of the church or of persons who have usurped authority. *Bouldin v. Alexander*, 15 Wal. 131.

30. Where two factions of a religious society resort to litigation to decide which has the right to control the church affairs and property, the unsuccessful faction will not be charged for the use of the property pending the litigation, no pecuniary advantage having been derived from the use, the property having been used wholly for church purposes, all who chose having been permitted to worship there, and no claim for compensation having been set up in the bill. *Bouldin v. Alexander*, 103 U. S. 330.

31. Where the members of a religious society agree to vest the legal title to their property in trustees, to be managed pursuant to articles stipulating that each member shall have a comfortable support for life, each renouncing all individual ownership, the heirs of a deceased member who has had the full benefit of that agreement have no title on which equity can make partition of the property. *Goessle v. Bimeler*, 14 How. 589.

*Church Lands* — *Vermont Successor to Rights of the Crown.*  
See VERMONT.

*Mission Lands in California.*  
See MISSIONS.

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*Mission Lands in Oregon* — *Title.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 114.

**RELIGIOUS USES** — *Devises to* — *In general.*

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**REMOVAL OF CAUSES** — *Constitutionality of Removal Acts.*

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*Removal from Florida Territorial Courts.*

See pl. 4.

*Removal from Louisiana Provisional Court.*

See pl. 5.

*Removal under Act of March 3, 1863.*

See pl. 6-8.

*Removal under Rev. Sts. § 641* — *Denial of Civil Rights.*

See pl. 9-13.

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*Removal under Rev. Sts. § 643 — Federal Questions involved.*

See pl. 14-18.

*Value of Matter in Dispute.*

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*Nature of Civil Suits removable.*

See pl. 20-35.

*Suits arising under Constitution or Laws of United States.*

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*Right of Removal as affected by Diversity of Citizenship.*

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*Jurisdiction of Federal Court — What must appear — Presumptions — Review by Supreme Court.*

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*Time when Application must be made.*

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*To what Federal Court Causes are removable.*

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*Proceedings in Federal Court — Legal and Equitable Causes of Action.*

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*Remanding Cause.*

See pl. 135-137.

*Effect of Removal on Subsequent Proceedings in State Court — Remedy when State Court persists in retaining Cause.*

See pl. 138-149.

**1. — Constitutionality of Removal Acts.]**

The act of March 2, 1867 (14 Sts. 558), providing for the removal of causes from state courts, at any time before trial or final hearing, on petition of the non-resident party, whether plaintiff or defendant, on affidavit of prejudice or local influence, is within the legislative discretion as to the exercise of the judicial power, and constitutional; and this, whether the removal be considered an exercise of appellate or an indirect exercise of original jurisdiction. *Chicago & Northwestern Railway Co. v. Whitton*, 13 Wal. 270.

**2.** The constitutionality of this and of like acts is settled. *Home Life Insurance Co. v. Dunn*, 19 Wal. 214.

**3.** The removal act of 1875 (18 Sts. 470), providing for the removal by either party of any suit of a civil nature arising under the constitution and laws of the United States, is not unconstitutional in its application to suits to which a state may be a party, the jurisdiction of the supreme court in such cases not being necessarily exclusive; and such cases, where they are cases of which no other act gives the supreme court exclusive jurisdiction, are under that act removable. *Ames v. Kansas*, 111 U. S. 449. As to the constitutionality of the act

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of March 3, 1863 (12 Sts. 756), and of § 641, Rev. Sts., see *infra*, pl. 6, 8, 9.

**4. — Removal from Florida Territorial Courts.]** Section 8, act of February 22, 1847 (9 Sts. 128), in providing for the transfer of cases of a federal character from the territorial courts of Florida to the federal courts, did not contemplate a transfer of unfinished cases; and, therefore, a conviction under an indictment found in the superior court of the territory, and afterwards transferred to the federal district court and there tried, is erroneous. *Forsyth v. United States*, 9 How. 571.

**5. — Removal from Louisiana Provisional Court.]** A cause brought in the provisional court established in Louisiana after the capture of New Orleans, could not be heard in the circuit court on transfer under the act of July 20, 1866 (14 Sts. 344), where the original petition was merely for a balance of account, and did not make out the diversity of citizenship requisite to federal jurisdiction, the act providing that the circuit court should hear only such causes as might ordinarily have been brought in a federal court. *Edwards v. Tanneret*, 12 Wal. 446.

**6. — Removal under Act of March 3, 1863.]** That part of section 5 of the act of March 3, 1863 (12 Sts. 756), which provides for the removal of causes brought in the state courts for acts done or omitted to be done under authority of the president, or secretary of war, or of any military officer of the United States in command at the place where the act or omission occurs, is not unconstitutional. *Nashville v. Cooper*, 6 Wal. 247; *Mitchell v. Clark*, 110 U. S. 633.

**7.** The act, in providing for the removal of cases for any arrest or imprisonment, "or other trespass or wrong" done, etc., applies only to personal actions for wrongs done under such authority, not to actions of ejectment. *Digelow v. Forrest*, 9 Wal. 339.

**8.** Where congress provides for the removal of a class of actions from the state to the federal courts, as it did by the act of March 3, 1863 (12 Sts. 755), relating to actions based on things done during the rebellion, under color of authority, it may prescribe a time within which such actions must be brought. [FIELD, J., dissenting.] *Mitchell v. Clark*, 110 U. S. 633.

**9. — Remoral under Rev. Sts. § 641 — Denial of Civil Rights.]** Section 641, Rev. Sts., providing for the removal to the circuit court before trial of any suit or prosecution in a state court, on the denial, etc., of any right secured by any law providing for the equal civil rights of citizens, authorized the removal of an indictment of a colored man where the state law made persons of color ineligible for service on juries; the equal protection of the laws being thereby denied. [CLIFFORD and FIELD, JJ., dissenting.] *Strauder v. West Virginia*, 100 U. S. 303.

**10.** While the fourteenth amendment prohib-

**REMOVAL OF CAUSES — continued.**

its the states, acting through whatever agency, from denying to any citizen the equal protection of the laws, Rev. Sts. § 641, providing for the removal of causes to the circuit courts in certain cases, on the denial of such protection, etc., is of narrower application. The removal thereby authorized being a removal before trial, the act must be deemed to contemplate only a denial by law, and does not justify a removal of an indictment where, by the state law, colored men are eligible as jurors, merely because the indictment was found by a grand jury composed wholly of white men, and a motion that the venire, which is for a like trial jury, be so modified as to include a certain number of colored men. *Virginia v. Rives*, 100 U. S. 313. And see *Bush v. Kentucky*, 107 U. S. 110.

11. Nor, for the same reasons, can a removal be had merely because at the time of the adoption of the fourteenth and fifteenth amendments colored men were, by the state constitution and statutes, ineligible, and neither the constitution nor the statutes have been formally changed, the adoption of the fifteenth amendment, by extending the right of suffrage, having had the effect to render inoperative such provisions of the state law, and the state courts having so adjudged. *Neal v. Delaware*, 103 U. S. 370.

12. Nor because, since the adoption of the amendments, the state has by statute declared colored men ineligible, the highest court of the state having declared the statute unconstitutional. *Bush v. Kentucky*, 107 U. S. 110.

13. Where a criminal case is removed to a circuit court under Rev. Sts. § 641, providing for removals in case of the denial of any civil right in the state court, the authority of the circuit court is limited to the trial of the indictment so removed; and where it quashes the indictment, it is without jurisdiction to proceed further, and the state court may again indict and proceed to try the defendant for the same offence. *Ib.*

14. — *Removal under Rev. Sts. § 643 — Federal Questions involved.* The power of congress, under that provision of the constitution which extends the judicial power to all cases in law and equity, etc., to authorize the removal of causes to the federal courts where federal questions are involved, includes the power to authorize the removal of criminal cases for alleged offences against state laws, criminal as well as civil cases being within the purview of that provision. *Tennessee v. Davis*, 100 U. S. 257.

15. Section 643, Rev. Sts., providing for the removal to the federal court of criminal prosecutions instituted in a state court against those acting under the United States revenue laws, is, therefore, constitutional, and authorizes the removal of a capital case where the defendant claims to have committed the homicide in self-defence, and while engaged in the discharge of his duties as collector of internal revenue; and

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an objection that the mode of proceeding in the federal court is not prescribed by act of congress is of no importance. [CLIFFORD and FIELD, JJ., dissenting, on the ground that the offence charged being an offence against the state law, a removal not only was not authorized by the act, but could not, with due regard to the constitution, be authorized.] *Ib.*

16. One who kills a man while engaged in assisting a deputy marshal in making an arrest under a warrant charging a violation of the internal revenue laws relating to illicit distilling, is entitled, when indicted in a state court for murder, to remove the cause to the federal court under section 643, which provides for such removal in the case of an "officer appointed under or acting by authority of any revenue law of the United States, or any person acting under or by authority of such officer." *Davis v. South Carolina*, 107 U. S. 597.

17. Where, under section 643, a prosecution is removed from the state court to the federal court in the manner required, the jurisdiction of the state court ceases when the defendant is taken into the marshal's custody by virtue of the writ of *habeas corpus cum causa*, issued by the federal court, and it follows that the sureties on a recognizance given for his appearance in the state court are discharged. *Ib.*

18. Section 643, Rev. Sts., providing for the removal to the federal courts of civil suits against revenue officers, is not superseded by the removal act of March 3, 1875 (18 Sts. 470). The later act repeals only such acts or parts of acts as are in conflict with it, and there is no conflict between the two enactments. *Venable v. Richards*, 105 U. S. 636.

19. — *Value of Matter in Dispute.* The sum demanded in the declaration is the "matter in dispute," within the meaning of § 12, judiciary act of 1789 (1 Sts. 79), and fixes the right to a removal, so far as it depends on such matter. *Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 15 How. 198.

20. — *Nature of Civil Suits removable.* A suit under a statute which, like the Kansas code, abolishes the common-law proceeding by information in the nature of *quo warranto*, and permits actions to be brought where that was the appropriate remedy, is "a suit of a civil nature" within the meaning of the removal act of 1875 (18 Sts. 470), and, therefore, so far removable. Such a statute has the effect to relieve that remedy, already civil in effect, of its criminal form, and to restore it to its original position as a civil proceeding for the enforcement of civil rights. *Ames v. Kansas*, 111 U. S. 449.

21. A marshal sued and convicted in a state court for trespass in levying on property of one other than the execution debtor cannot remove the case into the circuit court under either the act of March 3, 1863 (12 Sts. 755), or that of April 9, 1866 (14 Sts. 27), such a levy not being

**REMOVAL OF CAUSES — continued.**

made by authority "derived from any act of congress." *McKee v. Rains*, 10 Wal. 22.

22. A proceeding under a state statute for the confirmation of a title under a tax sale, however special or summary, may be removed to a federal court by a citizen of another state who is a proper party thereto. *Parker v. Overman*, 18 How. 137.

23. The right of removal is given only to a defendant who has not subjected himself to the jurisdiction of the state court,—not to the original plaintiff, who, by resorting to it, has become liable under the state law to a cross-action. Hence no removal can be made of a defence or answer, which, by discontinuance of the original suit, has become a proceeding which may go on to trial and judgment, as if in some sense an original suit. *West v. Aurora*, 6 Wal. 139.

24. A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is in essential particulars a suit in equity; and if by the law obtaining in a state, customary or statutory, such a suit can be maintained in one of its courts, it may, since the enactment of the removal act of March 2, 1867 (14 Sts. 558), be removed to the circuit court. [WAITE, C. J., and SWAYNE and BRADLEY, JJ., dissenting.] *Gaines v. Fuentes*, 92 U. S. 10. And see *Ellis v. Davis*, 109 U. S. 485.

25. A proceeding begun in a probate court to obtain payment of a claim against an estate in course of administration is removable to the federal court, if the claimant and the administrator are citizens of different states. The jurisdiction is not ousted by state statutes assuming to make that of the state courts exclusive. *Hess v. Reynolds*, 113 U. S. 73.

26. While a proceeding to take private property for public use is an exercise by the state of its sovereign right of eminent domain, with which the United States has no right to interfere by any of its departments, yet, where the sovereign power attaches conditions to the exercise of the right, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance, and if the inquiry assumes the form of a controversy, subject to the ordinary incidents of a civil suit, it may be transferred, like other suits, to a federal court. *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 403.

27. The right of the defendant to remove a suit under the act of 1875 is not affected by the fact that an injunction to restrain a levy by the defendant on the plaintiff's land had been granted by the state court before the application for removal was made. *Bondurant v. Watson*, 103 U. S. 281.

28. A replevin suit brought against a sheriff for seizing the plaintiff's goods on process against another is removable from the state to the federal court, the plaintiff and defendant being citizens of different states. *Kern v. Huidekoper*, 103 U. S. 485.

**REMOVAL OF CAUSES — continued.**

29. Where a suit is brought by a township against citizens of the state, and the "unknown owners and holders" of certain municipal bonds, the object of the suit being to have the bonds declared invalid, a citizen of another state, the holder of all the bonds, is entitled to a removal of the suit to the federal court. *Harter v. Ker-nochan*, 103 U. S. 562.

30. The removal act of 1875 repealed the second subdivision of Rev. Sts. § 639, permitting removals by aliens, etc., in certain cases. *Hyde v. Ruble*, 104 U. S. 407; *King v. Cornell*, 106 U. S. 395. A suit, therefore, in which the defendants are an alien and a citizen of the same state as the plaintiff, cannot be removed by the alien, although as to him there is a separable controversy. *King v. Cornell*, 106 U. S. 395.

31. That an assignment of a judgment was colorable affords the defendant no ground for removal to the federal court of the action brought in a state court on the judgment, although but for the assignment the diversity of citizenship would have been such as to give the right of removal. The validity of the assignment should be attacked in the state court. *Provident Savings Life Assurance Society v. Ford*, 114 U. S. 635.

32. Under the removal act of 1875, §§ 1, 2, a suit brought by a citizen of one state against a corporation of another state, on a fire insurance policy, assigned to the plaintiff by one whose citizenship is not stated, is removable to the federal court. *Clafin v. Commonwealth Insurance Co.*, 110 U. S. 81.

33. Neither by its own agreement nor by a statute can a corporation be deprived of its constitutional right to remove to the federal court a suit brought against it in the court of a state in which it does business, but of which it is not a citizen,—a foreign insurance company, for instance, so agreeing as one of the conditions on which it is permitted to do business in the state. [WAITE, C. J., and DAVIS, J., dissenting.] *Home Insurance Co. v. Morse*, 20 Wal. 445.

34. A corporation cannot remove into the circuit court an action brought against it by a citizen of a state by whose statutes it is incorporated, although it is also incorporated by earlier statutes in another state. *Memphis & Charleston Railroad Co. v. Alabama*, 107 U. S. 581.

35. A corporation chartered by one state, which acquires by lease railroad property in another state, does not thereby forfeit its right to remove to the federal court a suit brought against it by a citizen of the latter state. *Baltimore & Ohio Railroad Co. v. Knontz*, 104 U. S. 5.

36. — *Suits arising under Constitution or Laws of United States.* The jurisdiction of a circuit court, in a case between citizens of the same state, under the internal revenue acts of July 1, 1862, and March 3, 1863 (12 Sts. 432, 462), removed thereto from a state court under the act of March 2, 1833 (4 Sts. 632), and before



**REMOVAL OF CAUSES — continued.**

the passage of the internal revenue act of June 30, 1864 (13 Sts. 241), is saved by section 68 of the internal revenue act of July 13, 1866 (14 Sts. 172), whenever the justice is of opinion that the case would be removable from the state court under section 67 of the last-named act. *Philadelphia v. The Collector*, 5 Wal. 720.

37. And where the case is a case clearly so removable, and was pending in the circuit court when that act was passed, but not remanded, it is to be inferred as a conclusion of law that it was the opinion of the judge that it should be retained. *Ib.*

38. Under the act of March 3, 1875, authorizing the removal of suits "arising under the constitution or laws of the United States," a suit may be removed when the defendant raises a question involving the construction of a federal act; as, for instance, of an act under which he claims a vested right to maintain a bridge across a navigable river as part of a post road, the suit being brought by a state to compel the removal of the bridge as a nuisance. [MILLER, J., dissenting.] *New Orleans, Mobile, & Chattanooga Railroad Co. v. Mississippi*, 102 U. S. 135.

39. The right of removal cannot be sustained on the ground that the question involved in the case requires the construction of federal laws, unless the facts are set forth from which the conclusion follows. Where, therefore, in a suit brought to restrain the defendants from depositing the tailings and debris of their mines in a river channel, the defendants assert the right of removal on the ground that their mining property, bought from the United States, could only be worked by the hydraulic process, which necessarily required such deposit, and that their rights were derived from certain enumerated acts of congress, the construction of which, necessarily, was involved in the case, it was held that the right of removal did not appear. [BRADLEY, J., dissenting, on the ground that the facts stated raised a federal question.] *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199.

40. A question whether one has title to land all right to which the government has granted to a city for certain purposes, the title from the city depending on city ordinances as ratified by state statutes, is not a federal question justifying a removal, under the act of 1875. *Hoadley v. San Francisco*, 94 U. S. 4.

41. A suit to try the title of an incumbent to a state office, whereto the state authorities have duly declared the incumbent elected pursuant to the state laws, cannot be removed from a state to a federal court under the removal act of 1875 (18 Sts. 470), on his petition, setting forth that, by bribery and threats, colored persons were deterred from voting for him, and that the votes of the parishes where such illegal practices prevailed were rejected. No case arising under the constitution or laws of the United States is shown. *Dubuclet v. Louisiana*, 103 U. S. 550.

**REMOVAL OF CAUSES — continued.**

42. Nor does Rev. Sts. § 2010, giving one "defeated or deprived of his election" the right, in certain cases, to proceed in the federal courts, affect the case, the petitioner being in office and not out of it. *Ib.*

43. An action on the official bond of a marshal, founded on a seizure of goods worth more than five hundred dollars, under a writ issued by a court of bankruptcy, is a suit arising under federal laws, and may be removed. *Feibelman v. Packard*, 109 U. S. 421.

44. Where, in an action against a tax-collector for a seizure of goods, the plaintiff sets up a tender of coupons on state bonds by statute expressly receivable for taxes, and the collector rejoins a subsequent statute forbidding their receipt, a demurrer to the rejoinder raises a federal question laying the ground for a removal to a federal court. *Smith v. Greenhow*, 109 U. S. 669.

45. An action under a state statute in the nature of proceedings by *quo warranto*, to test the validity of a consolidation by a state railroad corporation with a foreign corporation under an act of congress, is a suit arising under a federal law within the meaning of the act of 1875. *Ames v. Kansas*, 111 U. S. 449.

46. A suit on a judgment recovered in a federal court is not necessarily a suit arising under the laws of the United States, which may be removed. *Provident Savings Life Assurance Society v. Ford*, 114 U. S. 635.

47. It is no ground for removal that, in a previous case between other parties, the state court construed the statutes of another state otherwise than as they had been construed by the court of such other state, and that, therefore, it is probable that the same construction will be given in the case pending. *Chicago & Alton Railroad Co. v. Wiggins Ferry Co.*, 108 U. S. 18.

48. — *Right of Removal as affected by Diversity of Citizenship.* Under § 2, act of 1875, a suit is not removable unless either all the parties on one side are citizens of different states from those on the other side, or there is a separable controversy wholly between citizens of different states. *Sewing-Machine Company's Case*, 18 Wal. 553; *Vannevar v. Bryant*, 21 Wal. 41; *Ayres v. Chicago*, 101 U. S. 184; *Blake v. McKim*, 103 U. S. 36; *Hyde v. Ruble*, 104 U. S. 407; *Winchester v. Loud*, 108 U. S. 130; *Shainwald v. Lewis*, 103 U. S. 158.

49. A suit, for instance, against several executors, one of whom lives in the same state with the plaintiff, brought to enforce the liability of the testator as surety on a probate bond. *Blake v. McKim*, 103 U. S. 336.

50. A suit cannot be removed on the ground of diversity of citizenship, where the real controversy is between citizens of the same state, because of a controversy between citizens of different states which arises out of it, where such controversy is a mere adjunct to the principal controversy, and incapable of a separate existence.

**REMOVAL OF CAUSES — continued.**

*Alexandria First National Bank v. Turnbull*, 16 Wal. 190; *Corbin v. Van Brunt*, 105 U. S. 576.

51. A proceeding, for instance, on a petition under a local statute by one who alleges ownership of property taken in execution against another, and prays to be permitted to intervene and try his title, is not removable. [STRONG, J., dissenting.] *Alexandria First National Bank v. Turnbull*, 16 Wal. 190.

52. A proceeding to annul the judgment of a state court for irregularity is not removable, such a proceeding being supplementary to, and a continuation of, the original suit. *Barrow v. Hunton*, 99 U. S. 80.

53. *Semble* that the fact that such proceeding under the state law can be taken only in the court which rendered the judgment or in the appellate court, while entitled to weight on the question of the jurisdiction of the federal court, is not conclusive. *Ib.*

54. Although a suit is founded on the judgment of a state court, if it has the essential elements of an independent suit, and is not merely auxiliary and incidental to the original suit, it may be removed to the federal court as may other suits. *Bondurant v. Watson*, 103 U. S. 281.

55. Where the plaintiff and all of the defendants but one are citizens of the state in which the suit is brought, and the appellate state court dismisses the suit as to all defendants but that one, and orders a trial of the issue left pending between him and the plaintiff, such defendant, under the act of July 27, 1866 (14 Sts. 306), may thereupon remove the cause to the circuit court. *Yulee v. Vose*, 99 U. S. 539.

56. Where a state statute provides that, on the rendition of a judgment dissolving an insurance company, its assets shall vest in the superintendent of the insurance department, the superintendent is the successor of a company so dissolved in such a sense that, on his being admitted a party to a suit brought against it in another state by citizens thereof, he may remove the suit to the federal court by virtue of his own citizenship. *Relfe v. Rundle*, 103 U. S. 222.

57. Under the first clause of section 2 of the act of 1875, the parties to a suit are to be ranged on one side or the other without regard to whether they occupy the position of plaintiffs or defendants in the pleadings, for the purpose of testing the right to a removal to the circuit court by reason of diversity of citizenship; and if there are two branches of the suit, and one is disposed of, the case is to be treated, for the purpose of removal, as though the branch disposed of had not existed, and as though the parties to the suit were those whose matters of dispute remain undetermined. *Meyer v. Delaware Railroad Construction Co.* [Removal Cases], 100 U. S. 457.

58. And under section 1 of the act the rule is the same. *Pacific Railroad Co. v. Ketchum*, 101 U. S. 289.

**REMOVAL OF CAUSES — continued.**

59. Under the second clause of section 2 of the act, where there is a controversy wholly between citizens of different states, which can be fully determined as between them, then either one or more of those actually interested in such controversy may remove the whole suit. [WAITE, C. J., and MILLER and FIELD, JJ., dissenting.] *Barney v. Latham*, 103 U. S. 205.

60. The right of removal depends on the case disclosed by the pleadings when the petition for removal is filed, and is not affected by the fact that a defendant, who is a citizen of the same state with one of the plaintiffs, may be a proper, but not an indispensable, party to the controversy. *Ib.*

61. The right of the real parties in interest to a removal is not affected by a joinder with them in the defence of merely formal parties who are citizens of the same state with the plaintiffs. *Wood v. Davis*, 18 How. 467.

62. Thus, the right of removal will not be defeated where the plaintiff seeks the surrender of a note, and such co-defendants are persons in possession thereof merely as agents of the party seeking removal, and attorneys employed to collect the same. *Ib.*

63. Nor because a defendant, who is a stranger to the controversy, his relation to it being substantially that of a mere garnishee, is a citizen of the same state as the plaintiff. *Bacon v. Rives*, 106 U. S. 99.

64. A trustee for holders of bonds secured by a mortgage of a railroad cannot be regarded as a nominal plaintiff whose citizenship may be disregarded in determining whether an action against lessees of the property is removable to the federal court, he still being charged with duties and responsibilities as trustee and never having been divested of his right of action. The removal act of March 2, 1867 (14 Sts. 558), does not change the pre-existing rules which determine who are to be regarded as parties plaintiff or defendant. *Knapp v. Troy & Boston Railroad Co.*, 20 Wal. 117.

65. Where one for whose benefit a trust deed with a power of sale in case of a default in the payment of the debt secured is made, seeks to subject the land to the payment of the debt, the trustee is a necessary party defendant, although he has not qualified by giving bond in accordance with the state law; and therefore the plaintiff and the trustee being citizens of one state, and the debtor a citizen of another state, the debtor cannot remove the suit from the state court to the federal court under the act of 1866, as without such party there can be no "final determination of the controversy so far as it concerns" the debtor. *Gardner v. Brown*, 21 Wal. 36.

66. The trustee of the legal title to land in possession of one claiming ownership thereof is a necessary party defendant to a suit brought for the possession of the land and for a conveyance,

**REMOVAL OF CAUSES — continued.**

and the plaintiff and the trustee being citizens of the same state, the defendant in possession cannot remove the suit to the federal court. *Myers v. Swann*, 107 U. S. 546.

67. Where a trustee in a deed given to secure a debt due to a citizen of a state other than that of which the grantor is a citizen, proceeds to sell the property, and the grantor brings a suit to enjoin the sale, making the creditor and the trustee parties defendant, and it does not appear that the trustee is not a citizen of the same state as the plaintiff, the suit is not removable to the federal court. The trustee is not a mere nominal party. *Thayer v. Life Association of America*, 119 U. S. 717.

68. Where one of several heirs-at-law appeals separately from a decree admitting a will to probate, he cannot remove the proceeding to the circuit court although he is a citizen of a state other than that in which the proponents of the will live, other heirs-at-law, who also appeal, being citizens of the same state as the proponents. There is no controversy wholly between citizens of different states. *Fraser v. Jennison*, 106 U. S. 191.

69. To a suit to set aside a will, the executors, who are also trustees of a fund for the plaintiff, are necessary parties, and if citizens of the same state with the plaintiff, there is not the diversity of citizenship requisite for removal to a federal court, although the defendant legatees and devisees are citizens of another state. *American Bible Society v. Price*, 110 U. S. 61.

70. The federal court has jurisdiction, under the act of 1875, of a foreclosure suit between citizens of different states founded on a mortgage given by a citizen of the state wherein the plaintiff's assignor resides, although the assignor, by reason of his citizenship, could not have maintained the suit in the federal court. *Mersman v. Werges*, 119 U. S. 139.

71. Where, in a foreclosure suit, a personal decree is also asked for, the original mortgagor, and one to whom he has sold the property and who has agreed to pay the debt as a part of the consideration, being made parties defendant, if the former is a citizen of the same state as the plaintiff, the purchaser cannot remove the suit to the federal court. The controversy is not a separable one within the second clause of section 2 of the act of 1875. *Ayres v. Wiswall*, 119 U. S. 187.

72. Nor is it made such by the fact that the original mortgagor admits the debt, and asks merely that his co-defendant shall be decreed primarily liable, while his co-defendant disputes the debt. *Ib.*

73. Nor can the right of removal be claimed on the ground that the original mortgagor is a nominal, and not a necessary and substantial, party to the suit. *Ib.*

74. A suit brought by citizens of a state against a corporation of that state and its directors,

**REMOVAL OF CAUSES — continued.**

some of whom are, and some of whom are not, citizens of that state, is not removable to the federal court, there being no separable controversy. *New Jersey Central Railroad Co. v. Mills*, 113 U. S. 249.

75. Where taxpayers seek to enjoin township trustees from certifying that the conditions authorizing the issue of township bonds in aid of a railroad have been complied with, and to enjoin the county treasurer from attempting to collect a tax voted in the premises, the trustees and treasurer, as well as the railroad company and a party to whom the company has assigned its interest in the tax, are necessary parties defendant, and all except such assignee being citizens of the same state, he cannot remove the case to the federal court. *Sully v. Drennan*, 113 U. S. 287.

76. Where one railroad corporation leases its road to another, both are necessary parties to a proceeding instituted by taxpayers to compel the line to be laid where it is claimed that the lessor corporation agreed to lay it in consideration of a vote of municipal aid; and, therefore, the lessor corporation being of the same state as the taxpayers, the proceeding is not removable to the federal court, although the other corporation is a foreign one. Nor is the case affected by the fact that the statute declares that a corporation operating the road of another shall in all respects be liable as though the road were its own. *Chicago & Northwestern Railway Co. v. Crane*, 113 U. S. 424.

77. To a suit by A. to compel the transfer of shares standing in B.'s name on the books of the corporation, both B. and the corporation are necessary parties. There is no separable controversy which one may remove to the federal court, the other being a citizen of the same state as the plaintiff. *St. Louis & San Francisco Railway Co. v. Wilson*, 114 U. S. 60.

78. The fact that several, sued jointly, sever in their defences, does make separable controversies giving to one defendant the right of removal not existing in favor of all. *Louisville & Nashville Railroad Co. v. Ide*, 114 U. S. 52; *Putnam v. Ingraham*, Id. 57; *St. Louis & San Francisco Railway Co. v. Wilson*, Id. 60.

79. Nor is it material that the state statute permits judgment to be given against one or more of several defendants sued jointly. *Louisville & Nashville Railroad Co. v. Ide*, 114 U. S. 52; *Putnam v. Ingraham*, Id. 57.

80. Under the act of 1867 (Rev. Sts. § 639), the removal of a suit pending in a state court between a citizen of the state and a citizen of another state, can be made only on the application of the latter party. *Hurst v. Western & Atlantic Railroad Co.*, 93 U. S. 71; *Bible Society v. Grove*, 101 U. S. 610.

81. Nor does the act of 1875 affect the rule, where the removal is claimed on account of "prejudice or local influence." *Bible Society v. Grove*, 101 U. S. 610.

**REMOVAL OF CAUSES — continued.**

**82.** — *Jurisdiction of Federal Court — What must appear. — Presumptions — Review by Supreme Court.* A petition under the act of March 2, 1867 (14 Sts. 558), for the removal of a cause from a state court, is defective in the allegation of citizenship where as to the parties on one side it alleges merely that "as such executors" they are citizens of a certain state, the citizenship necessary to jurisdiction under that statute, as in other cases where jurisdiction depends on citizenship, being personal and not representative citizenship. *Amory v. Amory*, 95 U. S. 186.

**83.** To remove a suit under section 12 of the judiciary act of 1789, it must appear that the requisite diversity of citizenship existed at the time of the beginning of the suit. *Phenix Insurance Co. v. Pechner*, 95 U. S. 183.

**84.** Under the act of 1875, the requisite diversity of citizenship must have existed when the suit was begun and also when the petition for removal was filed. *Gibson v. Bruce*, 103 U. S. 561; *Houston & Texas Central Railway Co. v. Shirley*, 111 U. S. 358; *Mansfield, Coldwater, & Lake Michigan Railway Co. v. Swan*, 111 U. S. 379.

**85.** Where one acquires from a party an interest in the subject-matter of a suit pending the litigation, and after expiration of the time within which the original parties might have removed it to the federal court, he has no right to a removal. *Cable v. Ellis*, 110 U. S. 389; *Houston & Texas Central Railway Co. v. Shirley*, 111 U. S. 358.

**86.** It is immaterial that the bill filed in a cause removed to the federal court does not show jurisdiction in that court, if the facts conferring the jurisdiction appear from the proceedings in the state court which form part of the record in the federal court. *Briges v. Sperry*, 95 U. S. 401.

**87.** Nor is it material that the petition for removal does not show the diversity of citizenship requisite to give jurisdiction, if the fact appear from the record. *Bondurant v. Watson*, 103 U. S. 281.

**88.** An averment of residence merely will not suffice, as the terms "citizen" and "resident" are not synonymous. *Parker v. Overman*, 18 How. 137.

**89.** Where, the necessary diversity of citizenship existing, an action has been regularly removed under section 12 of the judiciary act of 1789 (1 Sts. 79), the jurisdiction of the federal court is not ousted because it turns out that the action could not, by reason of the exception in section 11 of the act, have been brought originally in the federal court. *Green v. Custard*, 23 How. 484.

**90.** Under section 12 of the judiciary act, the defendant may remove the suit to the circuit court, although under section 11 the plaintiff, being assignee of a chose in action, would have been precluded from bringing suit in that court. *Bushnell v. Kennedy*, 9 Wal. 387.

**REMOVAL OF CAUSES — continued.**

**91.** Where the papers in a suit removed from a state court to the circuit court have been destroyed by fire, the court may presume, from the admission of the parties, that the citizenship requisite to give the circuit court jurisdiction was shown by the papers destroyed, no evidence to the contrary appearing. *Pittsburg, Cincinnati, & St. Louis Railway Co. v. Ramsey*, 22 Wal. 322.

**92.** If the record contain no copy of a petition for the removal of a cause from a state to a federal court, it will be presumed, on error, leave to remove having been refused, that the petition was defective in its allegations of jurisdictional facts, and that, therefore, it was properly disregarded. *Bush v. Kentucky*, 107 U. S. 110.

**93.** Section 5 of the removal act of 1875, providing that if it satisfactorily appears to the circuit court that a suit has been removed from a state court which does not really and substantially involve a controversy properly within the jurisdiction of the circuit court, it may be remanded, and that the order to that effect shall be reviewable by the supreme court, clearly contemplates a review of the decision of the circuit court remanding a cause on the ground that it has not been lawfully removed; the right of review is not limited to cases remanded because the subject-matter of the controversy is not within the jurisdiction of the circuit court. *Babbitt v. Clark*, 103 U. S. 606.

**94.** Nor is the right of review limited by the pecuniary value of the matter in dispute. *Id.*

**95.** Where the record fails to show the diversity of citizenship necessary to confer the right of removal from the state to the circuit court, the supreme court, on appeal or error, will reverse the decree or judgment of the circuit court without inquiry into the merits of the case, and will order it remanded to the state court. *Hancock v. Holbrook*, 112 U. S. 229.

**96.** If it appear that the removal was effected with the consent of both parties, each may be compelled to pay half the costs in the supreme court. *Id.*

**97.** — *Time when Application must be made.* Under the removal act of March 2, 1867 (14 Sts. 558), which declares that the petition for removal may be filed "at any time before the final hearing or trial of the suit," where, as in Ohio, a party is entitled to a second trial as of right, the removal may be had after the first and before the second trial. *Home Life Insurance Co. v. Dunn*, 19 Wal. 214.

**98.** But not after final judgment of the court of original jurisdiction, and pending an appeal to another state court. *Stevenson v. Williams*, 19 Wal. 572. And the rule is the same under the act of 1875.

**99.** Nor while a motion for a new trial is pending and undisposed of. The cause must be actually pending for trial. *Vannevar v. Bryant*, 21 Wal. 41.

**100.** After one trial has been had in a state court, the right to another must be perfected be-

**REMOVAL OF CAUSES — continued.**

fore a demand can be made for the removal of the case. If the state court still retain jurisdiction for the purpose of rehearing a motion on which a new trial has been ordered, there can be no removal. *Chicago & Northwestern Railway Co. v. McKinley*, 99 U. S. 147.

101. A trial before commissioners to whom a claim against the estate of one deceased is referred by the probate court, is not such a trial as is contemplated by the act of 1867 (Rev. Sts. § 639), requiring a removal before the trial, the local statute requiring the commissioner's report to be acted on by the judge of probate, and a right of appeal being given to a court in which a trial by jury can be had. *Hess v. Reynolds*, 113 U. S. 73.

102. The removal act of 1875 repeals all acts and parts of acts in conflict with its provisions. The provision of Rev. Sts. § 639, authorizing removals on the ground of prejudice and local influence at any time before trial or final hearing, is not embraced in the act of 1875; and a removal for that cause may be seasonably made, therefore, although not made at the first term at which the cause might have been tried. *Ib.*

103. Under the act of 1875 a cause cannot be removed after a trial has been had, a judgment rendered and set aside, and a new trial ordered. *Holland v. Chambers*, 110 U. S. 59.

104. The trial of an issue raised by a demurrer which involves the merits of the action is a trial of the action within the meaning of the removal act of 1875. A petition for a removal filed after such a trial is therefore too late. *Atley v. Nott*, 111 U. S. 472; *Scharff v. Levy*, 112 U. S. 711; *Gregory v. Hartley*, 113 U. S. 742.

105. A petition for removal is presented "before trial," if presented before the trial has fairly and properly begun in the orderly course of proceeding. *Meyer v. Delaware Railroad Construction Co.* [Removal Cases], 100 U. S. 457.

106. After the trial of an action in a state court resulting in a disagreement by the jury, and a consequent continuance to a subsequent term, a removal cannot be had. *American Bible Society v. Grove*, 101 U. S. 610.

107. After the merits of a case have been disposed of, and nothing remains to be done but to state accounts and settle the details of a final decree, a removal cannot be had under the act of 1866 or of 1867, any more than under the act of 1875. *Jifkins v. Sweetzer*, 102 U. S. 177.

108. A removal from a state court under the act of 1875 is seasonably demanded although demanded after the state appellate court has reversed a decree dismissing the suit and remanded it with leave to both parties to amend pleadings, and to take testimony, and for an account in accordance with its views. *Hewitt v. Phelps*, 105 U. S. 393.

109. Where one not served with summons appears within a year from the time of the rendition of the decree and demands to have the proceedings reopened, as the state statute de-

**REMOVAL OF CAUSES — continued.**

clares he may, he is entitled to a removal of the cause to the federal court at the first term thereafter, this being the first term when, as to him, the cause could properly be tried. *Harter v. Kernochan*, 103 U. S. 562.

110. Nor is his right of removal affected by the fact that he has not answered in the state court. *Ib.*

111. The requirement of the act of 1875, that the petition for removal shall be filed before or at the term at which the cause could be first tried, means at the first term at which the cause could have been tried had the parties taken the usual steps as to pleading and other preparations. *Babbitt v. Clark*, 103 U. S. 606; *Edrington v. Jefferson*, 111 U. S. 770; *Pullman Palace Car Co. v. Speck*, 113 U. S. 84; *Gregory v. Hartley*, 113 U. S. 742.

112. Where a cause pending on appeal in a state court on the passage of the act of 1875 was remanded for a rehearing, the decree below having been reversed solely on the ground of the admission of the evidence of incompetent witnesses, and the transcript was filed in the lower court at a term thereof within the time prescribed by the state statute, a petition for the removal of the cause to the federal court, filed at the same term and before such rehearing, was held to have been filed in due season. *King v. Worthington*, 104 U. S. 44.

113. A cause was pending at the time of the passage of the act of 1875, and, therefore, within its purview and removable, although the court had ordered its dismissal, and no appeal had been taken, an appeal being taken afterwards. *Hewitt v. Phelps*, 105 U. S. 393.

114. The requirement of the act of 1875 that the petition for removal must be filed before or at the term at which the cause could be first tried, is not jurisdictional. If a cause is removed too late, the party at whose instance the removal was had cannot be heard to deny the jurisdiction. *Ayers v. Watson*, 113 U. S. 594.

115. Where the federal court has remanded a case to the state court because of a failure to file a copy of the record within the time fixed by statute, a second removal cannot be had by the same party on the ground on which the first removal was based, even although the second petition is filed before the term at which the cause could first have been tried in the state court. *St. Paul & Chicago Railway Co. v. McLean*, 108 U. S. 212.

116. — *Irregularities in Application — When waived.* Where the bond given on removal is signed by a "good and sufficient surety," it is immaterial that it was also signed by an attorney in contravention of a state law and of the practice of the state court. *Meyer v. Delaware Railroad Construction Co.* [Removal Cases], 100 U. S. 457.

117. If the affidavit for removal sufficiently identify the suit, it is immaterial that it was

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made before the suit was filed in court. *Canal & Claiborne Streets Railroad Co. v. Hart*, 114 U. S. 654.

118. The absence of an oath to the petition for removal is, at most, only an informality which can be waived. *Ib.*

119. The point that the removal was not made in accordance with law cannot first be raised three years afterwards, after the testimony has been taken and the case is ready for hearing. *French v. Hay*, 22 Wal. 238.

120. Where, in the state court, no claim is made that a petition for removal is defective because not signed, the objection cannot avail in the circuit court. *Meyer v. Delaware Railroad Construction Co.* [Removal Cases], 100 U. S. 457.

121. — *To what Federal Court Causes are removable.*] Prior to the act of March 3, 1873 (17 Sts. 484), the district court for the middle district of Alabama was possessed of circuit court powers. To that court, therefore, a case in a state court within that district was removable, not to the circuit court for the southern district; and in a case removed to the latter court the court had no right to proceed. *Ex parte State Insurance Co.*, 18 Wal. 417.

122. Under the removal act of 1867 (Rev. Sts. § 639), a suit is removable into the federal court of the district wherein it is pending. It will make no difference that it arose in and was transferred from the court of a county in another district. *Hess v. Reynolds*, 113 U. S. 73.

123. — *Proceedings in Federal Court — Legal and Equitable Causes of Action.*] Whether, on the removal of a case under section 12 of the judiciary act, a new declaration should be filed, is a question of practice, and not a subject for error. *Etna Insurance Co. v. Weide*, 9 Wal. 677.

124. The circuit court to which a case has been removed may allow amendments in accordance with the practice of the courts of the state, as, e. g., an amendment adding new counts to the declaration for the cause of action stated in the counts originally filed. *West v. Smith*, 101 U. S. 263.

125. The circuit court takes a case removed to it as it was in the state court when removed. It cannot reconsider matters duly decided by the state court before the removal. *Duncan v. Gegan*, 101 U. S. 810.

126. The failure, on removal of a cause, to file a copy of the record in the federal court within the time fixed by statute does not deprive the court of jurisdiction to proceed. It may proceed or not, in its discretion; and such discretion, unless improperly exercised, will not be interfered with by the supreme court. *St. Paul & Chicago Railway Co. v. McLean*, 108 U. S. 212.

127. Where by the law of the state the defendant may avail himself of a set-off, he cannot be deprived of it after removal to the circuit

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court. *Partridge v. Phoenix Mutual Life Insurance Co.*, 15 Wal. 573.

128. Where, after the entry of a final decree in a suit in a state court, the plaintiff is permitted, erroneously, of course, to file an amended bill, and leave is given to the defendant to answer, and an issue is directed, the authority of the federal court, on removal thereto, is limited to the matters raised by the amended bill, and does not enable that court to set aside the decree entered on the original bill. *French v. Hay*, 22 Wal. 238.

129. Where an attachment suit pending in a state court is removed to a circuit court by agreement of parties, the attachment being of property in possession of a receiver appointed by the latter court in a suit between other parties there pending, and the removal being made pending an application for an injunction on the case so removed, the circuit court having jurisdiction of the subject-matter of the litigation, etc., will take jurisdiction to determine the conflicting claims, although there is defect of citizenship in the parties to the agreement. *People's Bank v. Calhoun*, 102 U. S. 256.

130. The final clause of section 3 of the act of 1875 does not repeal that provision of the revised statutes which authorizes the court, on the stipulation of parties, to try issues of fact without the intervention of a jury. *Phillips v. Moore*, 100 U. S. 208.

131. Where the pleadings in a case removed from a state court having equity cognizance are according to the state code of practice, the supreme court will decide on the merits, if they can be ascertained from the record, although the proceedings have not conformed to the mode prescribed for federal courts in chancery. *Gridley v. Westbrook*, 23 How. 503.

132. An action at law brought in a state court must retain the legal form on removal to a federal court, and cannot take the equitable to obviate a supposed difficulty as to parties, arising from the bringing of the action, pursuant to a state statute, in the name of the *cestui que use*, instead of in the name of him who would have been the proper party plaintiff at common law. *Thompson v. Central Ohio Railroad Co.*, 6 Wal. 134.

133. And in such case there is really no difficulty as to parties, as the plaintiff may remain plaintiff of record, and prosecute as he might have done in the state courts. *Ib.*

134. On removal to the circuit court of a suit embracing a legal and also an equitable cause of action, a separation must be had, the union of such causes in the federal courts being forbidden by Rev. Sts. § 913. *Hurt v. Hollingsworth*, 100 U. S. 100.

135. — *Remanding Cause.*] A federal court is not bound by a removal of a cause from a state court, but may remand it if sufficient ground for jurisdiction do not appear. *Urtetiqui*

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v. *D'Arcy*, 9 Pet. 692; *American Bible Society v. Grove*, 101 U. S. 610; *Ayres v. Wiswall*, 112 U. S. 187.

136. And this may be done, although a hearing has been had, and a final decree rendered on the merits, if the order to remand is made before the close of the term. *Ayres v. Wiswall*, 112 U. S. 187.

137. Nor is it material that parties have filed pleadings in the circuit court. *Ib.*

138. — *Effect of Removal on Subsequent Proceedings in State Court — Remedy when State Court persists in retaining Cause.* Any proceeding in the cause in the state court after the right of removal has attached is erroneous; and if any be had, the state court of error should examine the proceedings for removal and reverse the judgment without a plea to the jurisdiction, whatever the state of the record or the provisions of the state law as to the consideration of questions not on the record. *Kanouse v. Martin*, 15 How. 198.

139. If the defendant have a right to a removal, he cannot be deprived of it by the allowance by the state court of an amendment reducing the sum claimed, after the right of removal is complete. *Ib.*

140. Where a cause has been duly removed, but the state court nevertheless proceeds to an adjudication, the party who procures the removal may contest the suit there without waiving his right to question the jurisdiction so usurped when the proceedings are subsequently carried to the supreme court. *Home Life Insurance Co. v. Dunn*, 19 Wal. 214; *Meyer v. Delaware Railroad Construction Co.* [Removal Cases], 100 U. S. 457; *New Orleans, Mobile, & Chattanooga Railroad Co. v. Mississippi*, 103 U. S. 135; *Kern v. Huidekoper*, 103 U. S. 485.

141. Notwithstanding the refusal of a state court to make an order for removal, the filing of the transcript in the federal court invests that court with jurisdiction. All subsequent proceedings in the state court are void. *Kern v. Huidekoper*, 103 U. S. 485.

142. On the filing of the requisite petition and bond in a removable suit, the state court is divested of jurisdiction, and its subsequent orders are *coram non judice*. *National Steamship Co. v. Tugman*, 106 U. S. 118.

143. Nor is the jurisdiction restored by a failure to file a transcript of the record in the circuit court within the time prescribed by statute. *Ib.*

144. Nor by the consent of the party claiming the right of removal, that the issues be heard by a referee. *Ib.*

145. Nor by his contesting the case before the referee and in the state court. *Ib.*

146. Where the right of removal exists, but is denied by the state court, which forces the parties to trial therein, no rights are lost by a failure to enter the record and docket the cause in the

**REMOVAL OF CAUSES — continued.**

federal court on the first day of the next term. The entry may be allowed by the circuit court after the action of the state court has been declared illegal by the supreme court. *Baltimore & Ohio Railroad Co. v. Koontz*, 104 U. S. 5.

147. The federal court to which a case is removed may enjoin the plaintiff from attempting to enforce, by suit in the courts of another state, a judgment obtained by him, notwithstanding the removal, in the court from which the case was removed. *French v. Hay*, 22 Wal. 250.

148. And the action being one of replevin, and the state court having proceeded to judgment notwithstanding the removal, the federal court may enjoin a suit on the replevin bond. *Dietzsch v. Huidekoper*, 103 U. S. 494.

149. If a state court insist on proceeding with a cause properly removed to a federal court, the remedy is by writ of error after final judgment, not by interference on the part of the supreme court by prohibition or otherwise. *Chesapeake & Ohio Railroad Co. v. White*, 111 U. S. 134.

**Costs in Causes removed from State Court.**

See COSTS, 36 *et seq.*

**Petition — Dismissal — Not final for Purposes of Appeal.**

See APPEAL AND ERROR — JURISDICTION, 185, 189.

**Power of Congress under Fourteenth Amendment to provide for Removal of Causes on Denial of Civil Rights.**

See CIVIL RIGHTS, 14.

**Refusal of State Court to remove — Federal Question.**

See ERROR TO STATE COURT — JURISDICTION, 89.

**Restriction on Original Jurisdiction of Circuit Court in Cases brought by Assignee of Chime in Action does not apply in Cases of Removal from State Court.**

See CIRCUIT COURT — JURISDICTION, 80, 81.

**RENT CHARGE — Discharged by Sale for Direct Taxes under Acts of 1861-62.**

See DIRECT TAX, 21.

**RENTS AND PROFITS — Account not a necessary Incident of Redemption.**

See MORTGAGE — REDEMPTION, 5.

**In general.**

See LANDLORD AND TENANT.

**Mortgagee not entitled until he gets Possession — Liability therefor.**

See MORTGAGE — MORTGAGE, 5, 12, 13.

**REPEAL — Corporate Charters, as affecting the Obligation of Contracts.**

See CORPORATION — CHARTER.

**REPEAL** — *continued.**Letters-patent* — *How repealed.*See **PATENT** — **ISSUE**, 64.*Rule in Admiralty* — *When affects Pending Causes.*See **ADMIRALTY** — **PRACTICE**, 50.*Statutes* — *Repeal in general.*See **STATUTES** — **REPEAL**.**REPLEVIN** — *When it lies* — *Pleading* — *Evidence.*

See pl. 1-6.

*Replevin of Land.*

See pl. 7.

*Bond* — *Liability of Sureties* — *Measure of* — *How fixed* — *How satisfied* — *Action on* — *Pleading* — *Defence.*

See pl. 8-12.

**1. — When it lies** — *Pleading* — *Evidence.*]

In Michigan, replevin will lie at the suit of the mortgagee of chattels against an officer who has attached them in the possession of the mortgagor and as his property, and who refuses to surrender them to the mortgagee on demand. *Wood v. Weinart*, 104 U. S. 786.

**2.** Plea of *rien in arriere* admits the demise as laid in an avowry. *Alexander v. Harris*, 4 Cranch, 299.

**3.** The want of a *similiter* to a plea of property in an action of replevin is cured by verdict, and so is an omission to join issue on an avowry for rent in arrear. *Dermott v. Wallach*, 1 Black, 96.

**4.** A plea in replevin that the goods are not the property of the plaintiff is in substance a good plea in bar. *Ib.*

**5.** It is error to go to trial in replevin and take a verdict for the plaintiff on an avowry for rent in arrear, without regard to a good plea of no property in the plaintiff; if this be done, the trial is a mistrial. *Ib.*

**6.** Where, in an action of replevin, the plaintiff asserts property and right of possession, and the answer traverses these allegations, evidence, under the issue thus formed, is admissible to show that the plaintiff has neither property nor right of possession, as, *e. g.*, evidence of title in a stranger. *Schulenberg v. Harriman*, 21 Wal. 44.

**7. — Replevin of Land.**] Where one replevins land under the Texas statute, the bond that he gives takes the place of the land, which passes into his possession as fully as though he had acquired it in some other way in the absence of litigation. *Cornett v. Williams*, 20 Wal. 226.

**8. — Bond** — *Liability of Sureties* — *Measure of* — *How fixed* — *How satisfied* — *Action on* — *Pleading* — *Defence.*] The liability of the sureties on a replevin bond is not measured in a suit on the bond by the value of the principal's interest in the property, but by the value of the property when replevied, limited by the sum still due the attaching creditor, and the penalty of the bond. *Sweeney v. Lomme*, 22 Wal. 208.

**REPLEVIN** — *continued.*

**9.** A judgment in a replevin suit for a return of the property fixes the liability of the sureties on the replevin bond. It is not necessary that an execution should first be taken out. *Ib.*

**10.** Where, as in Maryland, a statute permits a defendant in replevin, in certain cases, to have the goods restored to him, on his giving a bond for their return if the court shall so adjudge, if the plaintiff, after judgment rendered in his favor, causes the officer to take the goods on a writ *de retorno habendo*, this is a satisfaction of the obligation of the bond, although the goods have become damaged. *Douglass v. Douglass*, 21 Wal. 98.

**11.** In a declaration on a bond, conditioned to prosecute an action of replevin with effect, an averment that "the suit was not prosecuted with effect" is a sufficient assignment of breach. *Gorman v. Lenox*, 15 Pet. 115.

**12.** In a suit on a replevin bond, the defendants cannot avail themselves of the failure of the court in the replevin suit to render the alternative judgment for the return of the property or its value, even if such omission constituted error for which the judgment in that suit might be reversed. *Sweeney v. Lomme*, 22 Wal. 208.

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**1 — What is — Rules of Construction.]**Statutes are to be considered as having only a prospective operation, unless otherwise indicated, either expressly or by implication. *McEwen v. Bulkley*, 24 How. 242; *Harvey v. Tyler*, 2 Wal. 328.**2.** In order that a statute may be construed to have a retrospective operation, the language should be so clear, strong, and imperative that the intention of the legislature cannot otherwise be satisfied. *Chew Heong v. United States*, 119 U. S. 536.**3.** Thus, the Tennessee statute of 1856, validating deeds acknowledged and proved in other states before the clerk of a court, is prospective only in its operation, and does not cover acknowledgments previously made. *McEwen v. Bulkley*, 24 How. 242.**4.** A statute which merely authorizes the imposition of a tax according to a previous assessment is not retrospective. *Locke v. New Orleans*, 4 Wal. 172.**5. — Constitutionality.]** A retrospective law which does not impair the obligation of a contract, nor partake of the character of an *ex post facto* law, is not prohibited by the constitution. *Satterlee v. Matthewson*, 2 Pet. 380.**6.** A state law which does not impair the obligation of a contract is not unconstitutional because it is retrospective and divests vested rights. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

**RETROSPECTIVE LAW** — *continued.*

7. A state act confirming a conveyance by an executrix of land sold without authority from the local court, and without local probate of the will, is not unconstitutional. *Wilkinson v. Le-land*, 2 Pet. 627.

8. A statute may make valid a conveyance of land executed by an attorney under a power given by the owner and his wife at a time when the law did not recognize such a transaction as valid. *Randall v. Kreiger*, 23 Wal. 137.

9. A statute giving validity to a deed which was void by reason of a defective statement of the particulars of acknowledgment by husband and wife, the grantors, although retrospective, was held not to impair the obligation of a contract. *Watson v. Mercer*, 8 Pet. 88.

10. A statute providing that a deed that has been *de facto* registered more than twenty years shall be deemed to have been registered lawfully, is not a retrospective law within the meaning of the constitution of Tennessee, although operating as to deeds registered before its passage. *Webb v. Weatherhead*, 17 How. 576.

11. Where a legislature has power to authorize a particular act to be done, *e. g.*, bonds to be issued in aid of the construction of a railroad, it may by a retrospective act cure any irregularity or informality in the doing of such act under authority before conferred. *Thomson v. Lee County*, 3 Wal. 327.

12. A statute giving a new remedy by bill of review, affecting the remedy only, is not unconstitutional. *Sampeyreac v. United States*, 7 Pet. 222.

13. Congress has power to mould the remedy, and may, in providing for bills of review in certain cases, dispense with the ordinary technical rules as to such bills. *Id.*

14. The Maine statute of 1848, so changing the law of disseisin as to bar a legal title valid at the time of its enactment, held inoperative, as against such title, because in conflict with the state constitution. *Webster v. Cooper*, 14 How. 488.

15. Vested rights of a creditor under a state statute enlarging remedies existing when the debt was contracted, or granting new ones, are beyond the reach of the legislature, and are not affected by a repeal of the statute. *Memphis v. United States*, 97 U. S. 293.

16. A statute which, like the Ohio statute of May 11, 1878, authorizes county auditors to extend back, notwithstanding annual settlements, for four years, inquiries concerning property which should have been returned for taxation, is not a retrospective law within the constitutional inhibition. *Sturges v. Carter*, 114 U. S. 511.

17. A Pennsylvania statute directing the sale of enough of the land of a certain debtor of the state to satisfy the judgment and other liens of the state thereon, there being, under existing laws, no mode of procuring payment, held not in conflict with the constitution of the state, nor

**RETROSPECTIVE LAW** — *continued.*

with that of the United States. *Livingston v. Moore*, 7 Pet. 469.

*Bankrupt Act of 1874*, § 10.

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**REVOLT** — “Endeavoring to make,” within the *Crimes Act of 1790*, what is — *Courts may define.*] The offence of “endeavoring to make a revolt,” within the meaning of the crimes act of April 30, 1790 (1 Sts. 112), consists in the endeavor of the crew, or one or more of them, to overthrow the legitimate authority of the commander, with intent to remove him from command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the commander to some other person. *United States v. Kelly*, 11 Wheat. 417.

2. Although the act does not define the offence, the court may. *Ib.*

**REVOLUTION** — *Corporations — Effect of the War thereon.*

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**REWARD** — *Offer of.*] Where the offer of a reward is made by public proclamation, it may be withdrawn in the same way, at any time before rights have accrued under it. No contract arises until the terms of the offer are complied with; and that the claimant of the reward was ignorant of such withdrawal is immaterial. *Shuey v. United States*, 92 U. S. 73.

2. Where a “liberal reward” is offered for information leading to the apprehension of a fugitive from justice, and a specific sum for his apprehension, one who gives information leading to the arrest is entitled to such reward, but not to the specific sum, unless he or his agents actually apprehend the fugitive. *Ib.*

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**RIGHT OF APPROACH** — A vessel approached in time of peace by a war vessel seeking to ascertain her character, although not bound to lie by, has no right to fire on the approaching vessel, on mere suspicion that she is a pirate; and if she do so, she may be lawfully captured. *The Mariana Flora*, 11 Wheat. 1.

*Belligerent* — *Right of Search.*

See RIGHT OF SEARCH.

**RIGHT OF SEARCH** — *What it is* — *Basis and Mode of Exercise* — *Distinguished from Right of Approach.*] The right of search is a belligerent right, not to be exercised in time of peace, unless against pirates and other offenders against the law of nations. *The Antelope*, 10 Wheat. 66.

2. To detain for examination is a right which a belligerent may exercise over every vessel, except a national vessel, which he meets on the ocean. *The Eleanor*, 2 Wheat. 345.

3. The principal right necessarily carries with it the means essential to its exercise. Thus, it may confer the right to assume the guise of a friend or of an enemy. *Id.*

4. The right of search grows out of the right of capture and is ancillary thereto, and it cannot arise except as a means to that end. *The Nereide*, 9 Cranch, 388.

5. The modern usages of war authorize the bringing of one of the principal officers of the vessel detained on board the vessel detaining, with the papers, for examination. *The Eleanor*, 2 Wheat. 345.

6. Where the master of a neutral vessel is required to send his papers on board a boarding vessel for examination, he is not excused by the fact that he has a government mail aboard. *The Peterhoff*, 5 Wal. 28.

7. Although on seizing a vessel as prize the captor must put her in charge of a competent prize-master and crew, yet in case of mere detention for examination, the commander of the detaining vessel may send an officer on board of the vessel detained, in order more conveniently to enforce his order for examination, without taking her out of the possession of her own officers and crew. *The Eleanor*, 2 Wheat. 345.

8. Although the belligerent right of search is a right which cannot be questioned, it must be exercised with as much regard to the safety of

**RIGHT OF SEARCH** — *continued.*

the vessel searched as is consistent with a thorough examination of her character and the nature of her voyage. *The Anna Maria*, 2 Wheat. 327.

9. Although the right of search does not exist in time of peace, a ship of war may approach other vessels at sea for the purpose of ascertaining their character. *The Marianna Flora*, 11 Wheat. 1.

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**SALE** — **AVOIDANCE** — *Fraudulent Misrepresentation and Concealment* — *What will avoid* — *Care and Diligence on Part of Defrauded Party.*] Misrepresentation, to vitiate a contract of sale, must relate not only to a material matter constituting an inducement to the contract, but to a matter of which the complaining party did not have at hand the means of knowledge; and it must be a misrepresentation on which he relied and by which he was actually misled to his injury. *Slaughter v. Gerson*, 13 Wal. 379.

2. The buyer is not bound to communicate to the seller intelligence of the signing of a treaty of peace which may enhance the value of the goods, although exclusively within his knowledge at the time of the sale. *Laidlaw v. Organ*, 2 Wheat. 178.

3. Any question of imposition in the sale, however, should be left to the jury. *Ib.*

4. Where a party, knowing the pecuniary condition of a debtor, purchases a claim against him of an ascertained amount, an opinion, however erroneous, expressed by the seller as to the value of the claim, does not affect the validity of the sale. Under such circumstances, each party is presumed to rely upon his own judgment. *Blease v. Garlington*, 92 U. S. 1.

**SALE** — **AVOIDANCE** — *continued.*

5. It is no defence to an action for the price of goods sold that the price was above the market rate, there having been neither fraud nor warranty, certainly when the purchaser selected the goods, and received and retained them without objection. *Millar v. Tiffany*, 1 Wal. 298.

6. A patentee who transfers his interest in the patent in consideration, *inter alia*, of an annuity to be paid by the transferee, cannot of his own motion rescind the contract for a failure to pay the annuity, where he has left the payment thereof to rest on the covenant of the other party. *Hartshorn v. Day*, 19 How. 211.

7. If the buyer of a cargo of flour receive a part thereof and pay for it, he cannot rescind as to the residue, merely because the flour is of a brand different from that mentioned in the memorandum of sale, but if the flour be inferior, he may sue or recoup. *Lyon v. Bertram*, 20 How. 149.

8. Where one would avoid a purchase for fraud, he must appear to have used care and diligence to discover the fraud, and to have acted promptly to repudiate the contract. *Upton v. Tribulcock*, 91 U. S. 45.

9. In Louisiana, as in general elsewhere, one who would avoid a contract of sale on account of defects must use reasonable diligence to apprise the seller of the defects alleged, and to offer to return the thing bought; and what is such diligence is a question of fact for the jury. *Andrews v. Hensler*, 6 Wal. 254.

10. And the time is not extended in that state, where the sale is a sale of slaves, by the statute limiting the redhibitory action in case of such sale to one year. *Ib.*

11. Where one induces a sale of goods to himself on credit, by fraudulently concealing his insolvency and his intent not to pay, the vendor is entitled to disaffirm the contract and recover the goods, no rights therein having been acquired by an innocent third person; and this, although the vendee has been adjudged a bankrupt since the sale, and an assignee has been appointed. *Donaldson v. Farwell*, 93 U. S. 631.

12. A purchaser of stock, who, for fraud, would disaffirm his purchase, is not bound, before bringing suit to recover the price paid, to receive and tender back to the vendor the certificate left by the vendor with his agent for the purchaser. *Pence v. Langdon*, 99 U. S. 578.

**SALE** — **BONA FIDE PURCHASER** — *Who is such a Purchaser* — *Equities.*] If the equitable owner of a chattel confer upon another all the indicia of ownership, his equity will not prevail over that

**SALE — BONA FIDE PURCHASER — continued.**

of a *bona fide* purchaser without notice. *Calais Steamboat Co. v. Scudder*, 2 Black, 372.

2. Thus, where a person residing in California employed an agent to contract for and superintend the building of a vessel in New York, and, in order to conceal his interest, directed the agent to hold himself out as the owner, and the agent made all the contracts in his own name, paid for work done and materials furnished thereunder with money supplied by the principal, registered the vessel as his own property, and finally, his principal having died, sold her for her full value to persons having no notice of the principal's interest, the administrator of the principal, having carried out the original arrangement for the building of the vessel, can have no relief against such purchasers. [*CLIFFORD and MILLER, JJ.*, dissenting.] *Ib.*

3. A purchaser of personal property from one who has no title and no authority to sell acquires no title good as against the owner by purchasing in good faith, for value, and without notice. *Ventress v. Smith*, 10 Pet. 161; *Warner v. Martin*, 11 How. 209.

4. Where A. requests B. to buy wheat for his immediate use, and B. buys with his own money, and ships to an agent who consents to be responsible for the wheat until drafts drawn against it are paid, and to whom the wheat is by the bill of lading deliverable, A. remains the owner, and a bank discounting his drafts and taking assignments of the bills of lading acquires a special property, and may maintain an action against a purchaser in good faith from A. to whom, not as purchaser of the wheat but as owner of an elevator, the wheat has been delivered by authority of the agent to whom it was shipped. The agent has no power prior to payment to make a delivery which shall divest the title of the owner; and A. takes as bailee and not as purchaser, and can give no title by sale and delivery. *Dows v. Milwaukee National Exchange Bank*, 91 U. S. 618.

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*Perishable Cargo — Constructive Total Loss.*

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*Personal Property — Owner out of Possession — Title passes.*

See TROVER, 3.

*Power of Sale in Mortgage or Trust Deed — Sale under.*

See MORTGAGE — POWER OF SALE.

*Pre-emption Right in Public Lands — Subject of Sale.*See LANDS OF UNITED STATES — PRE-EMPTION, 55 *et seq.**Public Lands in Pennsylvania.*

See LANDS OF STATES — PENNSYLVANIA, 5.

*Public Lands in North Carolina and Tennessee.*

See LANDS OF STATES — NORTH CAROLINA AND TENNESSEE.

*Public Lands of States — Consent of Congress not necessary.*

See LANDS OF STATES — IN GENERAL, 3.

*Public Lands — Sale in general.*See LANDS OF UNITED STATES — DISPOSAL, 25 *et seq.***SALE — PARTICULAR SALES — continued.***Railroad — In general.*See RAILROAD — COMPANY, 26 *et seq.**Railroad — Right of Company to sell.*

See RAILROAD — CONSOLIDATION.

*Real Property — In general.*

See SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

*Shares in Corporation.*

See CORPORATION — SHARES.

*State Property sold by State in Rebellion.*See GOVERNMENT BONDS, 5 *et seq.**States in Rebellion — Sales of State Property.*See STATES — RIGHTS AND POWERS, 23 *et seq.**Swamp Lands in Iowa.*

See LANDS OF STATES — IOWA.

*Trustee — Sales by Trustees, in general.*

See TRUST — TRUSTEE.

*Vessel and Cargo by Master.*See SHIPPING — MASTER, 1 *et seq.**Vessel in Foreign Port — Purchaser takes clear of Liens.*

See SHIPPING — OWNERSHIP, 2.

*Vessel — In general.*

See SHIPPING — OWNERSHIP.

**SALE — SELLER'S LIEN — What necessary thereto — Equities.]** Under the Illinois statute, if the vendor of chattels, although a non-resident, would avail himself of a lien for the purchase-money as against an attaching creditor of the vendee, he must comply with the provisions of the statute requiring record; nor can he otherwise protect himself by an instrument in form a lease, wherein the vendee agrees to pay the price as rent, the title to pass when the final payment shall be made, but the vendee, in the meanwhile, to sustain possession. *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Indianapolis, Bloomington, & Western Railway Co. v. Rhode Island Locomotive Works*, Id. 674.

2. But the lien of the vendor under an agreement that the property sold shall not become the property of the vendee until paid for, will prevail, although no record is made, over that of a prior mortgage of subsequently acquired property. The statute provides only that the lien shall not be valid against the rights of any third person, and the mortgagee is not a third person within the meaning of the statute. *Fosdick v. Schall*, 99 U. S. 235; *Fosdick v. Southwestern Car Co.*, Id. 256.

3. So under the Iowa statute, which contains a like provision for the protection of creditors or purchasers. The word "creditor" there means one who by suit has perfected a right to impeach the transaction, and not a creditor at large. *Myer v. Western Car Co.*, 102 U. S. 1.

4. Where it is apparent that a transaction under which a railroad company acquired the use of certain cars, although in form a lease, was not,

**SALE — SELLER'S LIEN — continued.**

in fact, a lease nor a conditional sale, but an absolute sale with an hypothecation of the cars to the vendors as security for the price, unless the contract is recorded, it cannot stand, in Missouri, as against a seizure of the cars on an execution against the railroad company. *Heryford v. Davis*, 102 U. S. 235.

**SALE — WARRANTY — What constitutes — When implied — Breach — Remedy — When Breach no Defence to Action for Price — Pleading in Action on Warranty.]** A contract of sale of a quantity of loose logs in a boom, to be scaled by the boom-master, by which the buyer agrees to take all merchantable logs at a fixed price per thousand feet, does not import a warranty of quality, but leaves the buyer free to reject such logs as are not merchantable. *Leonard v. Davis*, 1 Black, 476.

2. Where a dealer in wool having received from a broker a sample of wool in bales offers to buy at a certain price if the wool is equal to sample, and the offer is accepted on condition that the dealer examine the wool, and he opens and examines some of the bales as fully as he desires, and is offered an opportunity to open and examine the others, but declines, and concludes the purchase, the sale is not a sale by sample with a warranty that the wool shall correspond. *Barnard v. Kellogg*, 10 Wal. 383.

3. In such case, where some of the bales are found to be filled with damaged wool and foreign material, there being no express warranty, nor any fraud on the part of the seller, and the seller being neither manufacturer nor grower of the article sold, the maxim *caveat emptor* applies. *Ib.*

4. And in such case, evidence of a usage implying from the mere fact of sale a warranty that the wool is not falsely packed cannot be admitted to vary the contract, certainly where the parties are ignorant of the usage, proof of a usage being admissible merely to ascertain the intention of the parties, and on the theory that they have dealt with reference to it, but not to contradict the contract. *Ib.*

5. Bonds were offered for sale to a banker, who telegraphed to another banker for an offer. The defendants, on being applied to by the latter, made an offer, which was accepted. The next day the bonds were sent by the first banker to the second, with a letter asking that they be sold without recourse upon the sender. The defendants refused so to accept, but agreed to take them when ascertained to be good. In the mean time the defendants had telegraphed the plaintiff, a banker in another place, asking for an offer, which was in the same manner made and unconditionally accepted. The bonds were then delivered to the defendants, who sent them to their correspondent in the latter place, with a draft on the plaintiff for the amount, on payment of which the bonds were to be delivered. At the same time the defendants wrote the plaintiff reciting their ac-

**SALE — WARRANTY — continued.**

ceptance of his offer, but adding that, although they did not doubt the bonds, yet as they had purchased them from a stranger, they wished to sell them without recourse as to genuineness, and asking that they be examined and a telegram immediately sent as to their correctness. The plaintiff had already sold the bonds "to arrive;" and on their arrival, having received the defendants' letter, he took them to the purchaser, who took them, saying that they appeared to be all right, paid for them, and sent them to Europe; and the plaintiff telegraphed the defendants that the bonds were "all correct," and the defendants paid for them. It was immediately afterwards reported that there were counterfeits in existence, and the plaintiff so notified the defendants, but the defendants did not extend the notice. Had they done so, payment by the original taker might have been stopped. It was held, the bonds being counterfeit, that the telegraphic correspondence between the plaintiff and the defendants was a completed contract on condition, or with an implied warranty, that the bonds were genuine, and that the condition or warranty was not waived. [CLIFFORD, STRONG, and HUNT, JJ., dissenting upon the latter point.] *Uiley v. Donaldson*, 94 U. S. 29.

6. One who in good faith sells municipal bonds without a guaranty incurs no liability, although the bonds are held void for want of authority in the legislature to pass the acts under which they were issued. *Otis v. Cullum*, 92 U. S. 447.

7. A warranty on the sale of a slave to which the seller has a perfect title, that he is "a slave for life," and that the seller's title is "clear and perfect," is not broken by a subsequent liberation of the slave by the government. *Osborn v. Nicholson*, 13 Wal. 654.

8. A buyer of personal property may be relieved, in equity, from the payment of a just proportion of the purchase-money, where the seller, who warranted the title, has died insolvent, and the purchaser has been compelled by process of law to pay a sum of money to extinguish a paramount title to a part of the property. *Wanzer v. Truly*, 17 How. 584.

9. A judgment against the buyer, as the garnishee of the seller, for the entire amount of the purchase-money, will not deprive the buyer of such relief, for as between him and the judgment creditor he has the superior equity. *Ib.*

10. Proof of warranty, together with proof of unsoundness of the thing sold and of an offer to return it, does not constitute a defence to an action on a note given for the purchase-money, without proof that the plaintiff knew of such unsoundness at the time of the sale. *Thornton v. Wynn*, 12 Wheat. 183.

11. A breach of warranty of title to personal property is no defence to an action for the price, where there has been no eviction. *Randon v. Toby*, 11 How. 493.



**SALE — WARRANTY — continued.**

12. The declaration in an action for a false warranty, whether in assumpsit or in tort, need not aver a *scienter*; and if it be averred, it need not be proved. *Schuchardt v. Allen*, 1 Wal. 359.

**Latent Defects — Guaranty — Discharge.**

See **GUARANTY**, 28.

**SALE — WHAT CONSTITUTES — In general — Bill of Parcels — Invoice, etc.**

See pl. 1-7.

**When Property passes — Appropriation, what constitutes.**

See pl. 8-25.

**Delivery — As against the Creditors of the Seller — As against the Creditors of the Buyer.**

See pl. 26-40.

**Acceptance — What constitutes — Effect, etc.**

See pl. 41-46.

**Conditional Sale — What constitutes.**

See pl. 47.

1. — *In general — Bill of Parcels — Invoice, etc.*] A sale, whether in law or in equity, is a contract to pass and to take a right to property, for money, which the buyer pays, or promises to pay, to the seller for the thing sold. *Williamson v. Berry*, 8 How. 495; *Williamson v. Irish Presbyterian Congregation*, Id. 565.

2. A bill of parcels is not the contract of sale, and it is open to explanation by extraneous evidence. *Harris v. Johnston*, 3 Cranch, 311.

3. An invoice is neither a bill of sale nor evidence of a sale, and, standing alone, furnishes no proof of title. *Dows v. National Exchange Bank*, 91 U. S. 618.

4. In Louisiana, a bill of sale which contains only stipulations of the seller is not a synallagmatic contract, and need not be signed by the buyer. *Zacharie v. Franklin*, 12 Pet. 151.

5. Where a contract for the sale of goods is complete, the seller cannot add terms affecting the rights of the buyer by a memorandum on a subsequent bill of sale. *Schuchardt v. Allen*, 1 Wal. 359.

6. A sale by the owner of personal property in possession of one who has converted it, will pass a valid title. *Tome v. Dubois*, 6 Wal. 548.

7. Mere secrecy in the sale will not render it fraudulent. *Warner v. Norton*, 20 How. 448.

8. — *When Property passes — Appropriation, what constitutes.*] When the terms of the sale are agreed on, the bargain is struck and everything the seller has to do with the goods is complete, the title passes as between the parties, without payment or actual delivery. Thus, in case of a contract importing a present sale at a fixed price per foot of a certain number of feet of logs of a certain mark, loose in a boom and mingled with other logs, the measurements to be made by the boom-master, whose duty it was to scale all logs coming into the boom, and nothing

**SALE — WHAT CONSTITUTES — continued.**

remaining to be done by the seller, the title passed, although the whole quantity was to be rafted, scaled, and paid for in parcels and at various times. *Leonard v. Davis*, 1 Black, 476.

9. An article, one among many of the same description, is as completely sold, if afterwards selected and set apart by the parties, as if so appropriated when the contract was made. *Thompson v. Gray*, 1 Wheat. 75.

10. And it makes no difference therein that the property remains in the possession of the vendor as security for the payment of the purchase-money. *Ib.*

11. Where the buyer of goods gives a carrier the seller's order therefor, takes a bill of lading promising delivery to the consignee, and draws on the consignee on account of the shipment, attaching the bill of lading to the draft, the goods on delivery to the carrier pass to the consignee, the draft being accepted and paid. *Halliday v. Hamilton*, 11 Wal. 560.

12. Goods purchased in England by British merchants on orders from America, and shipped to the American agent of such merchants, also an American citizen, "on account and risk of an American citizen," were held to have vested in the purchasers on shipment. *The Merrimack*, 8 Cranch, 317.

13. But if the goods were shipped with instructions that they be not delivered in certain circumstances, nor without payment in cash, they would not so vest, although accompanied by invoices, bills of lading, and letters addressed to the purchasers, under cover to the consignor's agent, also an American citizen. *Ib.*

14. The fact that the goods continue throughout the voyage at the risk of the shippers is not conclusive of the rights of the consignees. *Ib.*

15. And it makes no difference that the consignors, in their letter to their agent, referred to the goods as British property. *Ib.*

16. Goods shipped on account and at the risk of the consignor, the master takes as the consignor's agent; and the consignor may countermand his orders at any time before delivery, and to prevent the consignee's lien from attaching. *The Frances*, 8 Cranch, 418.

17. The property in goods shipped from Great Britain pursuant to orders from this country, held, in the circumstances, to have vested originally in the consignees, and not to have been divested by an assignment of the goods by the shipper, after purchase but before final shipment, as security for certain advances. *The Mary and Susan*, 1 Wheat. 25.

18. If an agent abroad purchasing goods in pursuance of orders, purchase on his own credit, and consign to his own house for delivery to the principal on compliance with certain conditions, they remain his and at his risk. *The St. Joze Indiano*, 1 Wheat. 203.

19. A consignor may, by assignment of goods at sea of which he is the owner, make a title

**SALE — WHAT CONSTITUTES — continued.**

thereto good against any one other than a *bona fide* indorsee of the bill of lading. *Conard v. Atlantic Insurance Co.*, 1 Pet. 386; *Harris v. D'Wolf*, 4 Pet. 147; *Conard v. Nicoll*, 4 Pet. 291; *Conard v. Pacific Insurance Co.*, 6 Pet. 262.

20. A contract for the sale of so much of a large quantity of cotton in bales as the buyer shall get out in safety to a market, passes no present title to any part of the cotton, none being ever got out; and a direction by the seller to the buyer as to where the price shall be paid has no bearing on the case. *The Elgee Cotton Cases*, 22 Wal. 180.

21. A contract for the sale of cotton, whereby the sellers agree to deliver it at a certain landing, the buyer to furnish bagging, rope, and twine to bale it, the cotton to be paid for when weighed and to be at the buyer's risk from the time of the date of the contract, is an executory contract only, and if the buyer merely takes possession of the cotton and keeps it for several months at his own cost, and pays no part of the price, and no steps are taken toward baling or weighing it, the title remains in the seller; and it is immaterial that the contract recites that the sellers "have sold," etc. Nor does it make any difference that earnest-money to a small amount is paid, this fact being of little or no importance in determining whether a contract for the sale of chattels is executed or executory. [BRADLEY and HUNT, JJ., dissenting.] *Ib.*

22. Where one purchased spirituous liquor to be shipped to his residence in another state, the seller to furnish certain labels, which were delivered to the purchaser at his request, a finding by the jury in a suit for the price, the liquor having been shipped as agreed, that the labels added to the value of the liquor and "formed part of the price," and that the purchaser accepted them at the place of purchase as part of the goods, is conclusive on the question of place of acceptance, so that the contract may be valid, if good in the state of purchase, although void under a prohibitory liquor law of the state of the purchaser's residence. *Garfield v. Paris*, 96 U. S. 557.

23. Under a contract for supplying labor and materials and making a chattel, the question of whether the property passes to the vendee before the chattel is completed is a question of intent, open in every case, to be determined on the terms of the contract and the circumstances of the transaction. Thus, where the United States entered into a contract for the construction of a floating battery, it was held that the facts that advances were made as the work progressed, that the government was authorized to require the presence of an agent to join in certifying to the accounts, questions of quality and fitness, however, being reserved for determination on completion of the work, and that all materials received at the yard for use in the construction

**SALE — WHAT CONSTITUTES — continued.**

were to be marked "U. S." and belong to the United States, were not conclusive evidence, taken in connection with the facts that the contractor was required to mortgage other property to secure his faithful performance of the contract, and that final payment was to be made only on the certificate of examiners, of an intent to vest the property in the battery in the United States prior to its completion, the contract expressly stating that the advances were to be made in consideration of the security given by the mortgage, but that the property in the battery, before its completion, remained in the contractor. *Clarkson v. Stevens*, 106 U. S. 505.

24. Where A. agreed to buy a cargo of merchandise of B., who induced C. to furnish the money for its purchase, and A. accepted it knowing that it belonged to C., it was held that A. was liable to C. for the price, and could not recoup damages sustained by B.'s failure to cause it to be delivered at the time agreed. *Atlantic Phosphate Co. v. Grafflin*, 114 U. S. 492.

25. Where property is destroyed by accident, he in whom the title is vested must bear the loss; and the rule applies in case of loss of supplies intended for the government through seizure by the public enemy, without default of the contractor, from whom the title has not passed. *Grant v. United States*, 7 Wal. 331.

26. — *Delivery — As against the Creditors of the Seller — As against the Creditors of the Buyer.* An absolute bill of sale of a chattel, not accompanied and followed by possession, is *per se* fraudulent. *Hamilton v. Russell*, 1 Cranch, 309.

27. And under the Virginia statute against fraudulent sales, it is not rendered valid as against attaching creditors of the vendor by being recorded within eight months. *Ib.*

28. The Virginia statute is coextensive, as respects fraudulent conveyances, with statutes 13 and 27 Eliz., which were in affirmance of the common law. *Ib.*

29. If there be no change of possession, the sale is *prima facie* fraudulent, but the want of it is open to explanation. *Warner v. Norton*, 20 How. 443.

30. Want of possession of goods assigned while at sea, due diligence to take possession on arrival having been used, or become useless, is not a badge of fraud. *Conard v. Atlantic Insurance Co.*, 1 Pet. 386; *Harris v. D'Wolf*, 4 Pet. 147; *Conard v. Nicoll*, 4 Pet. 291.

31. And where personal property is of such a character or in such a condition when sold that it cannot be actually delivered, a delivery of the bill of sale or other evidence of title is a transfer of the property good as against creditors of the vendor. *Gibson v. Stevens*, 8 How. 384.

32. Thus, if a commission merchant make advances on goods stored in a distant city, and receive the warehouse receipt from the owner as security, with an order thereon for delivery of the property to himself, the legal title will pass

**SALE — WHAT CONSTITUTES — continued.**

to him as security for his advances, so that a creditor of the former owner may not take them on attachment. *Ib.*

33. And it can make no difference, in case of such an attachment, that the warehouseman had not received notice of the transfer, such a notice having been seasonably given; nor that the former owner retained an equitable interest, although that interest might be attached. *Ib.*

34. In Missouri, a sale of household furniture in a house occupied jointly by vendor and vendee is fraudulent and void as to the vendor's creditors, where the parties have and continue to have equal use of the furniture, and where there is no change of possession other than such as there is in going about and looking at the different articles, agreeing on a price, making an inventory, and executing and delivering a bill of sale acknowledged before a notary. *Allen v. Massey*, 17 Wal. 351.

35. Where A. agreed, by a written unrecorded contract, to make a million staves for B., and to pile them on land leased to B. by an unrecorded lease, near A.'s mill, and it was agreed that a certain percentage of the price should be paid from week to week as the staves should be delivered, and that on piling and counting and payment of the stipulated percentage the delivery should be deemed complete, it was held, as to staves thus delivered, that title had passed, so that levy thereon of an execution by a creditor of A. could not be sustained. *Hatch v. Standard Oil Co.*, 100 U. S. 124.

36. Where one agreed to sell and another to buy a quantity of wood to be delivered in the yard of a company that had agreed to take it from the vendee, the vendor's title passed when the wood was deposited in the yard, so that a levy afterwards made under an execution against the vendor was ineffective; and this, although the company had not formally accepted the wood or recognized the vendee's ownership, and although the vendee took the wood for a debt which embraced, in part, a sum advanced at the time of the agreement, and for which the vendor gave his note only by way of precaution, and to meet the contingency of a failure to deliver the wood. *Wyoming National Bank v. Dayton*, 102 U. S. 59.

37. In Louisiana, an actual delivery of immovables is not essential to the validity of a sale thereof made by public act before a notary. The law considers tradition as accompanying the act. *Conrad v. Waples*, 96 U. S. 279.

38. The question of whether there was a delivery of certain chattels cannot be conclusively determined from a recital in the contract of sale that the sellers "hereby deliver said machines at the places named in the list." *Marsh v. McPherson*, 105 U. S. 709.

39. Whether the delivery on a sale of personal property was colorable merely, is a question of fact for the jury. *Warner v. Norton*, 20 How. 448.

**SALE — WHAT CONSTITUTES — continued.**

40. The common-law rule that the lieu of the vendor of personal property, to secure payment of purchase-money, is lost by voluntary and unconditional delivery to the purchaser, does not prevent the parties from contracting for a lien, which, as between themselves, will remain good. *Gregory v. Morris*, 96 U. S. 619.

41. — *Acceptance — What constitutes — Effect, etc.* Goods shipped partly on and partly without orders, with an option to accept or reject the whole in a limited time, remain the property of the shippers until election is made to accept them. *The Frances*, 8 Cranch, 354.

42. No right of property to goods shipped, to be sold on joint account of consignor and consignee, or on account of the former alone, at the option of the latter, vests in the latter until he make his election. *The Venus*, 8 Cranch, 253.

43. An intention of consignors to vest property in the consignee is not enough to change the title to property not ordered; the goods must be received, or the consignee must agree to take them on his own account; and it makes no difference if the consignee be the agent of a third person who had directed him to order the goods. *The Frances*, 8 Cranch, 359.

44. Goods shipped by a British to an American house in two lots on two vessels, with an option to accept or reject the whole, will not all pass to the consignee on receipt and acceptance of one lot, but the property in the other lot will remain in the consignor. *The Frances*, 9 Cranch, 183.

45. A consignment on a bill of lading for delivery "to A. for the use of B.," with delivery to the carrier, the purpose being to secure to B. a debt due from the consignor, may be presumed to have been assented to by B., and will pass the property at once. *Grove v. Brien*, 8 How. 429.

46. Where a creditor agrees to accept a certain number of merchantable wagons in payment of a debt, the wagons to be sold at the highest obtainable prices, and the proceeds above the debt to be paid to the debtor, the creditor, by not rejecting wagons as being not merchantable, and selling them, must be deemed to have accepted them as payment *pro tanto*, and cannot afterwards be heard to contend that they were not merchantable. *Winchester & Partridge Manufacturing Co. v. Funge*, 109 U. S. 651.

47. — *Conditional Sale — What constitutes.* A contract between a car manufacturer and a railroad corporation, which, while speaking of a loan of cars by the former to the latter for hire, not only fixes no price for the hire, but shows that none was contemplated, which recites the delivery of notes by the latter to the former for the selling price of the cars, and the delivery of collaterals to secure payment of the notes, the notes maturing within four months from the date of contract, and it being stipulated that they should be paid at maturity, is not a contract for hire or bailment of the cars; and the con-

**SALE — WHAT CONSTITUTES — continued.**

tract providing that the notes are to be held as collateral, and collected by the vendor for himself and not for the vendee, and that the latter within the four months may purchase the cars, until then, however, having no title to them, their redelivery being provided for in case of the non-payment of the amount, in which case the vendee shall sell them, and apply the proceeds on the notes, paying any surplus to the vendee, shows, not a conditional, but an absolute sale, with a hypothecation of the cars as security for the price. [BRADLEY, J., dissenting, on the ground that the transaction was a conditional sale.] *Heryford v. Davis*, 102 U. S. 235.

*Sale under Internal Revenue Act of 1866,*  
§ 9 — *What constitutes.*

See INTERNAL REVENUE — PERSONS AND THINGS TAXED, 71.

**SALT SPRINGS — Reservation in disposing of Public Lands.**

See LANDS OF UNITED STATES — DISPOSAL, 14 *et seq.*

**SALVAGE — Property subject — Derelict Property — Government Property.**

See pl. 1-7.

*Who deemed Salvors — Pilots, Corporations, etc.*

See pl. 8-17.

*Amount of Salvage — Matter of Discretion.*

See pl. 18-31.

*Distribution — Who entitled — Forfeiture — Suits for Salvage.*

See pl. 32-41.

*Salvage Contracts.*

See pl. 42-48.

1. — *Property subject — Derelict Property — Government Property.* To constitute a case of dereliction, there must have been more than a temporary leaving to obtain assistance; namely, a final abandonment, without hope of recovery or intention to return. *The Island City*, 1 Black, 121.

2. Where a vessel in peril was assisted by another to a position of greater but not absolute safety, and then left in possession of another, which in turn helped her to a still better position and left her at anchor without a crew, while she herself went to take on fuel, and a third vessel thereupon found her and took her into port, it was held that, the peril having been continuous, and the three vessels having contributed to the rescue, the three were entitled to share in the salvage. *Ib.*

3. Where the master, crew, and all on board leave a vessel at anchor in a violent gale, in extreme fear for their personal safety, she is derelict, although on the way to port the master says to the master of the vessel that takes them off

**SALVAGE — continued.**

that he intends to get a tug to bring her in. *The Laura*, 14 Wal. 336.

4. Where a vessel undertakes to save a derelict, she will not be liable for a total loss occurring while that undertaking is in progress, if she act in good faith and with reasonable judgment and skill. *Ib.*

5. Property saved is not exempt from a lien for salvage services because it belongs to the government. *The Davis*, 10 Wal. 15.

6. The property of neutrals is generally to be restored without salvage; but if the recapture be lawful, and a meritorious service be rendered the neutral, by relieving the property from real and imminent danger of condemnation, salvage is due. *Talbot v. Seeman*, 1 Cranch, 1.

7. The right to salvage on recapture, herein held to be recognized and regulated, not created, by acts of congress. *Ib.*

8. — *Who deemed Salvors — Pilots, Corporations, etc.* A pilot, while acting in the line of his strict duty as pilot, cannot entitle himself to salvage. *Hobart v. Drogan*, 10 Pet. 108.

9. But if he perform salvage services after his relation to the vessel has ended, he is not disabled from claiming salvage by his occupation, nor by the fact that he acted as pilot of the vessel saved. *Ib.*

10. Corporations chartered and organized to carry on the business of saving wrecks may maintain suits for salvage, notwithstanding the services are all performed by hired agents who have no share in the profits of the business. *The Comanche*, 8 Wal. 448.

11. A vessel owned by a corporation may be entitled to salvage. *The Blackwall*, 10 Wal. 1.

12. A tug which by direction of the fire department of a city carries city fire-engines to a burning vessel in the harbor, and lies alongside while the engines under management of the department are operated to extinguish the fire, is entitled to salvage, the vessel being saved. *Ib.*

13. Her owners will not be deprived of salvage by neglect of the representatives of the fire department to make a claim as co-salvors. *Ib.*

14. A libel for salvage may be filed in the name of the master and owners of the salving vessel, although the master make no claim for himself, but on the contrary disclaim. *Ib.*

15. A non-commissioned captor of enemy's property is entitled to compensation only by way of salvage. *The Dos Hermanos*, 10 Wheat. 306.

16. Where a vessel negligently causes another to take fire, no claim for salvage can be maintained for putting out the fire and so preventing a total loss. *The Clara*, 23 Wal. 1.

17. France was an enemy of the United States in March, 1799, within the meaning of the act of March 2, 1799, § 7 (1 Sts. 716), so that a public armed vessel of the United States was entitled to salvage under that act on the recapture of an American vessel that had been captured by a French privateer. *Bas v. Tingy*, 4 Dal. 37.

**SALVAGE — continued.**

18. — *Amount of Salvage — Matter of Discretion.*] If the amount of salvage be not regulated by any positive law, it must be reasonable in view of the peril from which the property was relieved, and the danger incurred in relieving it. *Talbot v. Seeman*, 1 Cranch, 1.

19. It necessarily rests on an enlarged discretion, and varies to suit each case. *Post v. Jones*, 19 How. 150.

20. The amount of salvage being matter of discretion with the court, a decree therefor will not be disturbed, except in case of some clear and palpable mistake, or gross over-allowance. It is against sound policy and public convenience to encourage appeals in such matters of discretion. *The Sybil*, 4 Wheat. 98; *Hobart v. Drogan*, 10 Pet. 108; *The Comanche*, 8 Wal. 448.

21. A vessel abandoned at sea was found by another bound on a foreign voyage with a valuable cargo and without supernumerary hands, and was taken into port with great risk and exertion by the salvors. One third part of the gross value was allowed as salvage. *McDonough v. Dannery*, 3 Dal. 188.

22. The salvage act of March 3, 1800 (2 Sts. 16), allows as salvage one-sixth part of the value of the cargo, whether of armed or unarmed vessels. *The Adeline*, 9 Cranch, 244.

23. One sixth of the net value awarded as salvage. *Talbot v. Seeman*, 1 Cranch, 1.

24. One-third of the gross value of vessel and cargo allowed for salvage, and one third of the salvage awarded to the owners of the saving vessel and cargo. *Mason v. The Blaireau*, 2 Cranch, 240.

25. Half of the gross value of goods saved from a derelict vessel in Delaware Bay allowed to the salvors. *Peisch v. Ware*, 4 Cranch, 347.

26. Where a public vessel of the United States took and brought in a Spanish vessel with native Africans on board, who had been brought from Africa to a Spanish colony in violation of the laws of Spain, and who in course of transportation had risen, killed the master, and taken possession of the vessel, one third of vessel and cargo was allowed as salvage. *The Amistad*, 15 Pet. 518.

27. Where cargo was saved from a derelict wreck on the coast of Behring's Straits, a moiety was allowed, considering the circumstances, for salvage, and freight for carrying the other moiety from the nearest port of safety in the Sandwich Islands to a better market at New York, the home port. *Post v. Jones*, 19 How. 150.

28. One twentieth of the value of the property saved was allowed to a tug for carrying fire-engines to a burning vessel in a harbor, and lying alongside, while the engines, under management of the city fire department, were operated to extinguish the fire. *The Blackwall*, 10 Wal. 1.

29. Where a vessel which with her cargo was worth two hundred and thirty-six thousand dollars, being towed down the Mississippi from

**SALVAGE — continued.**

New Orleans, on her way to sea, came to anchor in the evening, with the tug lashed to her side, and in the night, a passenger, there being no watch, awakened by smoke from cotton burning in the poop, gave an alarm, and with the help of the officers, crew, and passengers of the tug, and with the tug's pump and hose, put out the fire in twenty minutes, it was held, no efficient aid having been given by the officers or crew of the vessel, that it was a case of salvage service as to such passengers, and the tug and her officers and crew, although there was no serious risk of damage to the tug or of injury to the salvors. *The Con-nemara*, 108 U. S. 352.

30. It was held also that, as under the act of February 16, 1875 (18 Sts. 315), restricting the appellate power of the supreme court in admiralty cases, the court cannot alter a decree for salvage because the amount awarded appears to be too large, unless the excess is so great that on any reasonable view of the facts the award cannot be justified by the rules of law, an award of six per cent would not be disturbed. *Ib.*

31. Where the owners of logs carried from their booms and scattered by a flood, but saved and sawed by other persons, bring trover for their conversion, the salvors are entitled — the saving and sawing having been approved — to just compensation for their labor and expenses therein. *Tome v. Dubois*, 6 Wal. 548.

32. — *Distribution — Who entitled — Forfeiture — Suits for Salvage.*] The share of an apprentice in salvage belongs to him and not to his master. *Mason v. The Blaireau*, 2 Cranch, 240.

33. A mariner of a vessel saved, who was left on board when she was abandoned by her officers and crew, and who aided in the saving, is entitled to a share of the salvage. *Ib.*

34. The claim of the ship-owner for freight and general average should be against that portion of the proceeds of the cargo which is adjudged to the owner, and should be pursued by a distinct proceeding, and not by interposition in the salvage cause. *The Sybil*, 4 Wheat. 98.

35. Although the rule by which salvage is divided in the proportion of one third to the owner of the vessel and two thirds to the officers and crew may not apply where the vessel is propelled by steam, and the motive power is therefore the principal instrument, a question not now decided, the usual rule must be applied where there is nothing in the pleadings or proof raising that question. *The Island City*, 1 Black, 121.

36. The non-prosecution by one set of salvors of their claim for salvage inures to the benefit of the owners of the vessel saved, not to that of other salvors who do prosecute. *The Blackwall*, 10 Wal. 1.

37. If a salvor embezzles part of the goods saved, he forfeits his right to salvage. *Mason v. The Blaireau*, 2 Cranch, 240.

**SALVAGE** — *continued.*

38. The right to salvage may be forfeited by spoliation, smuggling, or gross neglect of the salvor. *The Bello Corruenes*, 6 Wheat. 152.

39. If salvors collude with the master to defraud the owner by means of an arbitration, they forfeit all their rights, and a court of admiralty has jurisdiction to reach and restore the property awarded. *Houseman v. The North Carolina*, 15 Pet. 40.

40. While secret embezzlement or theft by one or two members of the crew of a salvor will not forfeit the right of the others to salvage compensation, known, general, and unchecked plundering and stealing by officers and crew will justify a denial of compensation to all of them. *The Island City*, 1 Black, 121.

41. A suit for salvage cannot be abated on the objection of the claimants that others are entitled to share with the libellants in the compensation, the remedy of such others being by becoming parties to the suit, or by making claim against the proceeds in the registry. *The Comanche*, 8 Wal. 448.

42. — [*Salvage Contracts.*] A salvage service is not the less such, because rendered under a contract which regulates the mode of ascertaining the compensation, but makes the payment of any contingent upon substantial success. *Ib.*

43. No contract short of one to pay a fixed sum at all events, whether successful or unsuccessful, will bar a meritorious claim for salvage. *Ib.*

44. The defence that the services were rendered under an agreement for a fixed sum, payable at all events, is waived, unless set up in the answer, with an averment of payment or tender. *Ib.*

45. Agreements for salvage compensation are subject, as to amount, to the judgment of the court in view of the equities. *The Tornado*, 109 U. S. 110.

46. Where parties enter into a contract to raise a sunken vessel within a certain time for a definite compensation, they cannot, having raised her, repudiate the contract and maintain a libel for salvage. *Bondies v. Sherwood*, 29 How. 214.

47. Three tugs employed by a master at fifty dollars per hour each to pump out a vessel sunk at a wharf in order to extinguish a fire, compensation to continue "until the boats were discharged," are sufficiently compensated by a thousand dollars each, where they pumped only eighteen hours and the vessel floated, although they remained undischarged with the vessel twelve days, no peril requiring their continued attendance, and the authority of the master being displaced by a seizure by a marshal after the contract was made and before the pumping was begun, and the marshal permitting the pumping to go on, but not requesting the tugs to remain after it was over. The tugs must be deemed to have been discharged when the vessel floated. *The Tornado*, 109 U. S. 110.

**SALVAGE** — *continued.*

48. An agreement of consortium made by the masters of two vessels employed in the business of salvage is deemed to be made in behalf of the owners and crew as well as of themselves, and, in the absence of a stipulation to that effect, is not dissolved by a change of one of the masters. *Andrews v. Wall*, 3 How. 568.

*Award to Captors.*

See PRIZE — PRACTICE, 19.

*Claim compromised or referred by Master.*

See SHIPPING — MASTER, 22, 23.

*Costs in Salvage Case.*

See COSTS, 9.

*Freight not a Charge on Salvage of Cargo in Hands of Insurer.*

See INSURANCE — MARINE, 166.

*Lien on Government Property for Salvage — Enforcement.*

See UNITED STATES — SUITS, 21.

*Proceedings therefor — Contract of Consortium between Salvors — Jurisdiction in Admiralty.*

See ADMIRALTY — JURISDICTION, 63.

*Proceedings therefor — Distinct and Several Interest of Salvors and of Claimants — Joinder of Salvors.*

See APPEAL AND ERROR — JURISDICTION, 120-122.

*Proceedings therefor — Joinder of Proceedings in Rem with Proceedings in Personam.*

See ADMIRALTY — PRACTICE, 44-46.

*Right of Purchaser of Derelict Vessel to Salvage — Sale set aside.*

See SHIPPING — MASTER, 3.

*Salvor — Donee of Captured Vessel — When to be treated as Salvor.*

See CAPTOR — IN GENERAL, 7.

**SAN FRANCISCO** — *Title to Lands.*] The history of the title of San Francisco to her municipal lands, stated. *Trenouth v. San Francisco*, 100 U. S. 251.

*Lands — Decree confirming Title.*

See LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS, 312.

*Water Front — Control not abandoned by State.*

See CALIFORNIA.

*Water Front — Right thereto.*

See WATERS, 32.

**SAVINGS BANK** — *Corporator — Status.*

See BANK, 2.

*Deposits — Tax on, under Internal Revenue Act of 1864.*

See INTERNAL REVENUE — PERSONS AND THINGS TAXED, 59 *et seq.*

**SAVINGS BANK** — *continued.*

*Loan thereto cancelled for Irregularity, when.*  
See CORPORATION — POWERS AND LIABILITIES, 23.

**SCHOOL** — *Commissioner — Record as Evidence.*  
See EVIDENCE — DOCUMENTARY, 25.

*Lands — Grants of Public Lands for School Purposes.*

See LANDS OF STATES — IN GENERAL;  
LANDS OF STATES — MISSOURI; LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 9 *et seq.*

**SCIRE FACIAS** — *Nature.*] A writ of scire facias, although a judicial writ, is in the nature of a declaration, and the plea is properly to the facts therein alleged. *Winder v. Caldwell*, 14 How. 434.

*Bail — Defence — What constitutes.*  
See BAIL, 19.

*Revival of Judgment — Averments necessary to revive Judgment in Ejectment.*

See EJECTMENT — PLEADING AND PRACTICE, 39.

*Revival of Judgment — Fi. fa. issued in Debtor's Lifetime.*

See EXECUTION, 49.

*Revival of Judgment — In general.*  
See JUDGMENT — ACTION.

*Revival of Judgment — Issued after Death of Judgment Debtor, void.*

See EXECUTION, 2, 3.

*Revival of Judgment — Presumption from Lapse of Time — Demurrer.*

See PLEADING — DEMURRER, 8.

**SEAL** — *Chattel Mortgage in Ohio — Seal not necessary.*

See CHATTEL MORTGAGE, 1.

*Commission from New Unacknowledged Government — Seal will not prove itself.*

See EVIDENCE — DOCUMENTARY, 31.

*Corporate Seal — When necessary to bind Corporation.*

See BANK, 6; CORPORATION — POWERS AND LIABILITIES, 39, 42.

*County Warrants in Iowa — Seal necessary to Regularity.*

See COUNTY, 10.

*Municipal Bonds — Effect of Want of Seal.*

See MUNICIPAL BONDS — IN GENERAL, 58-60.

*Municipal Bonds — Effect of Seal on Negotiability.*

See MUNICIPAL BONDS — NEGOTIABILITY, 2.

*Release — Seal necessary.*

See RELEASE, 1.

**SEAL** — *continued.*

*What constitutes — Impression on Paper.*

See DEED — REQUISITES, 5, 6.

*What constitutes, in New York.*

See ASSUMPSIT, 6.

**SEAMEN** — *Rights, Duties, etc. — In general.*  
See SHIPPING.**SEARCH** — *Belligerent — Right of Search — In general.*

See RIGHT OF SEARCH.

*Right to search for Persons suspected of being engaged in Rebellion.*

See REBELLION, 7.

**SEARCH-WARRANT** — *Treasury Distress-warrant is not.*

See RECEIVER OF PUBLIC MONEY, 22.

**SEAWORTHINESS** — *Question of Mixed Law and Fact for Jury.*

See INSURANCE — MARINE.

*Warranty — Contract of Insurance.*

See INSURANCE — MARINE, 54.

*What constitutes.*

See CARRIER — DUTY AND LIABILITY, 4, 17.

**SECESSION** — *In general.*

See REBELLION.

*Ordinance of Secession a Nullity.*

See STATES — UNION, 4, 5.

**SECRETARY OF THE NAVY** — *Power to contract for Construction of Vessels of War, etc.*  
See NAVY DEPARTMENT.**SECRETARY OF THE TREASURY** — *Powers in general.*

See TREASURY DEPARTMENT.

**SECRETARY OF WAR** — *Power to suspend Payment on Fraudulent Contract, and to appoint Commissioners to adjust.*

See WAR DEPARTMENT, 1.

**SECURITY** — *Collateral — In general.*

See COLLATERAL SECURITY.

*What is a giving of, within the Meaning of the Bankrupt Act of 1841 — Exchange of Securities.*

See BANKRUPTCY — PRIOR TRANSACTIONS, 36, 45, 46.

**SEISIN** — *Covenant of — How broken.*

See COVENANT — IN GENERAL, 7.

*Possession, etc. — Seisin as affecting.*

See LIMITATION — ADVERSE POSSESSION.

**SEISIN** — continued.

*Seisin of Husband* — Right to Dower does not attach on the Seisin incident to Conveyance to Husband and Contemporaneous Mortgage back for Purchase-money.

See DOWER, 3.

*State Title* — Seisin not inconsistent with Indian Title.

See LANDS OF STATES — GEORGIA, 1.

*Writ of Right* — Seisin necessary.

See WRIT OF RIGHT.

**SEIZURE** — When justified — By whom made — Pleading.] A seizure for the breach of municipal law can be justified on the ground of probable cause, only under some statute. *The Apollon*, 9 Wheat. 362.

2. At common law, any person may at his peril seize for forfeiture to the government; and if the government adopt his act and the property be condemned, he will be justified. *Gelston v. Hoyt*, 3 Wheat. 246; *The Caledonian*, 4 Wheat. 100.

3. The act of February 18, 1793, § 27 (1 Sts. 315), empowered any officer of the revenue to seize a vessel for any forfeiture. *Ib.*

4. A plea justifying a seizure for a forfeiture should allege not only the facts relied on to establish the forfeiture, but that the property thereby became and was forfeited. *Gelston v. Hoyt*, 3 Wheat. 246.

5. A plea justifying a seizure for a forfeiture under the neutrality act of June 5, 1794 (1 Sts. 381), should allege due recognition of the state against which the vessel was intended to cruise. *Ib.*

6. In trespass, in a state court, for an alleged illegal seizure, a plea merely alleging forfeiture under laws of the United States is bad, for that attempts to draw to the cognizance of a state court a question of which the federal courts have exclusive jurisdiction. *Ib.*

7. *Semble* that the pendency of proceedings in the district court to enforce forfeiture is ground for a plea in abatement to an action of trespass against an officer for alleged illegality of seizure. *Ib.*

*Abandonment* — Effect on Jurisdiction.

See DISTRICT COURT — JURISDICTION, 3.

*Blockade* — Violation — What justifies Seizure.

See BLOCKADE, 11 *et seq.*

*Cargo* — Does not justify Abandonment of Vessel to Insurer.

See INSURANCE — MARINE, 99.

*Confiscation* — Effect of Seizure on Liens — Seizure necessary to Jurisdiction, etc.

See CONFISCATION, 13, 14, 26 *et seq.*

*Contraband* — Liability to Seizure.

See CONTRABAND, 5.

**SEIZURE** — continued.

*Court in District where Seizure is made, or into which Property is brought* — Jurisdiction to try for Forfeiture.

See DISTRICT COURT — JURISDICTION, 9-11.

*Forfeiture under Neutrality Act of 1794* — Who may seize.

See NEUTRALITY, 9.

*High Seas, for Breach of Municipal Regulation* — Justifiable under Law of Nations — Sovereign cannot authorize.

See INTERNATIONAL LAW, 2-8.

*Illicit Trading* — Insurance — Exception in Policy.

See INSURANCE — MARINE, 61 *et seq.*

*Jurisdiction in Admiralty.*

See ADMIRALTY — JURISDICTION, 92 *et seq.*

*Land* — Seizure on — Jury Trial not necessary.

See JURY, 51.

*Made in Waters of Friendly Power* — Jurisdiction of Federal Courts.

See FEDERAL COURTS — JURISDICTION, 34.

*Municipal Law* — Breach — Seizure not made within Territory of another Country.

See MUNICIPAL LAW.

*Necessary to Jurisdiction under Abandoned and Captured Property Acts.*

See ABANDONED AND CAPTURED PROPERTY, 1.

*Necessary to Sale on Foreclosure* — Where.

See MORTGAGE — FORECLOSURE, 46.

*Non-intercourse Acts* — Breach — Seizure.

See EMBARGO.

*Piratical Aggression* — Cause for Seizure.

See PIRACY, 8.

*Revenue Laws* — Violation.

See DUTIES — PENALTIES AND FORFEITURES.

*Revenue Laws* — Seizure on Navigable Waters — Practice of District Courts.

See DISTRICT COURT — PRACTICE, 1 *et seq.*

*Sheriff's Return not authenticated by Signature* — Proof that there was no Seizure.

See WRIT AND PROCESS, 17.

*Slave-trade Acts* — Breach — Seizure.

See SLAVE TRADE.

*Vessel seized after Expiration of Law.*

See SHIPPING — REGULATION, 28.

*Vessel* — Right to seize and send in for Examination includes what — Unlawful Seizure.

See CAPTURE — CAPTOR'S DUTIES, ETC., 6, 8.

*Want of Actual Seizure by Sheriff, cured by Five Years' Possession.*

See EXECUTION, 47.



**SEIZURE** — *continued.*

*What constitutes — Debts — Realty — Shares in Corporations — Taking into Possession.*  
See CONFISCATION, 28 *et seq.*, 64.

*What constitutes — Open, Visible Claim of Possession.*

See CAPTURE — IN GENERAL, 2, 3.

*When complete — Probable Cause.*

See DUTIES — PENALTIES AND FORFEITURES, 15, 16.

**SENATE** — *In general.*

See CONGRESS.

**SENTENCE** — *What irregular.*

See CRIMINAL PROCEDURE, 14.

**SEPARATE ESTATE** — *Married Woman's — In general.*

See HUSBAND AND WIFE.

**SEPARATE MAINTENANCE** — *Husband's Covenant therefor — Enforcement in Equity.*

See HUSBAND AND WIFE, 30, 31.

**SEPARATION** — *Property of Wife from Property of Husband.*

See HUSBAND AND WIFE.

**SERGEANT AT ARMS** — *Liable for Imprisonment on Warrant of the Speaker, if the House exceeded its Authority.*

See CONGRESS, 23.

**SERVICE** — *Appeal — Notice — In general.*

See APPEAL — TAKING AND PERFECTING.

*Error — Writ — In general.*

See ERROR — BRINGING AND PERFECTING.

*Writ or Process — In general.*

See WRIT AND PROCESS.

**SERVITUDE** — *What is, within the Meaning of the Thirteenth Amendment.*

See CIVIL RIGHTS, 19.

**SET-OFF** — *Legislative Control of Set-off — Set-off may be made of what Demands — Between what Persons — Set-off in Equity — Set-off against United States — Practice.* Where rights of third parties do not interfere, the extent to which mutual obligations may be set off against one another, and the mode in which this may be done, are matters for legislative control. *Blount v. Windley*, 95 U. S. 173.

2. A debtor of a bank, therefore, may avail himself of the provisions of statutes which authorize him to set off against a judgment already obtained by the bank against him, circulating notes of the bank procured by him after the judgment, it not appearing that there are creditors of the bank whose rights would be thereby affected. Such statutes, although retroactive as to prior

**SET-OFF** — *continued.*

judgments, do not violate any contract and are valid. *Ib.*

3. The defendant in an action for money paid, etc., cannot set off a claim for bad debts incurred by the misconduct of the plaintiff in selling the defendant's goods as factor to persons known by him to be unworthy of credit, such misconduct being matter for inquiry in a suit for that purpose. *Winchester v. Hackley*, 2 Cranch, 342.

4. A creditor on an open account who has assigned his claim to a third person with the assent of the debtor, may maintain an action thereon in his own name for the use of the assignee; but the debtor may apply his charges against the assignee in set-off. *Ib.*

5. If three joint owners of a cargo employ the master to sell it for them, and he afterwards become interested in the share of one of them, he cannot set off his share of the proceeds in an action by them for the whole amount. *Young v. Black*, 7 Cranch, 565.

6. If an agent effect two policies of insurance, and give his own note for the premium, the underwriters, in an action on one of the policies, may set off the amount of the premium on the other. *Leeds v. Marine Insurance Co.*, 6 Wheat. 565.

7. And, if prevented by injunction from doing so, equity will compel the principal to allow the amount to be deducted from the judgment. *Ib.*

8. A banker, who is also a director of an insurance company, can set off against its demand for money deposited at interest and payable on call, the amount due him on policies; and the company having been adjudicated a bankrupt, his right is equally available against the assignee. *Scammon v. Kimball*, 92 U. S. 362.

9. In Virginia, in an action by the assignee of a negotiable promissory note against the maker, the maker may set off a negotiable note of the assignor which he held when he received notice of the assignment, if it became due before the note in suit, although it was not due when notice was given. *Stewart v. Anderson*, 6 Cranch, 203.

10. In equity, if, after assignment of a debt, the debtor acquire a claim against the assignor, he may not set it off against the assignee, unless he acquired it before notice of the assignment. *Brashear v. West*, 7 Pet. 608.

11. A court of equity will not allow a set-off arising out of a distinct transaction, except on some special ground, such as an intervening insolvency, or a mutual credit on the faith of the debts. *Dade v. Irwin*, 2 How. 383.

12. Nor will it allow a set-off of a stale and suspicious claim. *Ib.*

13. A bill by a defendant against whom there has been only an interlocutory order referring the cause to a master for an account, brought to set off a former judgment against the complainant, is prematurely filed and cannot be maintained. *Providence Rubber Co. v. Goodyear*, 9 Wal. 807.

**SET-OFF — continued.**

14. Where a foreclosure sale was set aside for fraud on the part of the mortgagee, who became the purchaser, and the mortgagor brought a suit to charge the mortgagee for use and occupation, and for waste, it was held that the mortgagor was not entitled to a personal judgment except for the excess beyond the mortgage debt, the statute of Montana, where the proceedings were had, not requiring that, in such a case, the decree should be revived by the mortgagee, in order that it should be operative for the purpose of such set-off. *Fort v. Roush*, 104 U. S. 142.

15. Where the United States obtains a decree against a corporation for the payment of money, and applies for execution, a corporation which has succeeded the defendant may not have a disputed claim for services which it has rendered since the decree applied in payment. The validity of the claim cannot be so litigated. Resort must be had to the court of claims. *Nashville & Chattanooga Railroad Co. v. United States*, 101 U. S. 639.

16. In Pennsylvania, if the verdict be for the defendant, and a sum be found due to him, under a plea in set-off, the judgment is not *quod recuperet*, but that the defendant go without day, the finding of the jury as to the sum due operating merely as the foundation for a *sci. fa.* *Reeside v. Walker*, 11 How. 272.

**Audita Querela — Set-off, when available.**

See AUDITA QUERELA.

**Bankruptcy — What may be set off.**

See BANKRUPTCY — PROCEEDINGS TO CONVERT ESTATE, 36 *et seq.*

**Between Insolvent Corporation and Subscriber to its Stock — When permissible.**

See CORPORATION — SHARES, 9.

**Between Parties to Replevin not admissible in Action on Bond.**

See EVIDENCE — RES INTER ALIOS, 3.

**Circuit Court — Causes removed from State Courts.**

See REMOVAL OF CAUSES, 127.

**Government — Money due Officer.**

See RECEIVER OF PUBLIC MONEY, 17, 29 *et seq.*

**Government's Right thereto in Certain Case.**

See UNITED STATES — PRIORITY OF PAYMENT, 11.

**Judgment not opened to let in Set-off of which Defendant might have known.**

See JUDGMENT — OPENING AND REVERSAL, 2.

**Judgment on Set-off against the United States.**

See UNITED STATES — SUITS, 15-17.

**Jurisdiction in Error — As affected by.**

See APPEAL AND ERROR — JURISDICTION, 69, 86, 126.

**Maker of Note cannot claim, when.**

See BILLS AND NOTES — INDORSEMENT, 34.

**SET-OFF — continued.****Partners and Creditors.**

See PARTNERSHIP, 53.

**Proceedings on Libel for Collision.**

See ADMIRALTY — PLEADING, 20.

**Recoupment — Matters of.**

See RECOUPMENT.

**Usurious Interest — When Matter of Set off.**

See USURY, 53.

**Waived, no Ground for Injunction.**

See INJUNCTION, 34.

**SETTLEMENT — What constitutes — How far conclusive — How impeached.]**

Receipt of payment after the day, on a bond conditioned for payment of a sum of money to the agent of the United States in Europe on a day certain, or, in default thereof, for payment thereof at the current rate of American exchange, with damages at the rate of twenty per cent thereon, and lawful interest, is a waiver of the right of the obligee to the agreed damages. *United States v. Gurney*, 4 Cranch, 333.

2. But not a relinquishment of the right to interest on the money during the period of default. *Ib.*

3. A custom-house official who for ten years has accepted each month, and receipted for, his compensation on the basis of a deduction for Sundays, cannot maintain a claim for the amount deducted, although, possibly, the deduction might have been unauthorized by law. *Pray v. United States*, 106 U. S. 594.

4. The settlement of an account is only *prima facie* evidence of its correctness; it may be impeached for fraud or mistake, and concludes nothing as to items not embraced therein. *Perkins v. Hart*, 11 Wheat. 237; *Conard v. Nicoll*, 4 Pet. 291.

5. On a bill to open a settled account, and to surcharge and falsify it, the proof of the errors complained of must be clear, or the settlement will be a bar. *Chappedelaine v. Dechenaux*, 4 Cranch, 306.

6. Contracts entered into in a spirit of peace, and for the settlement of unadjusted demands on both sides, will not be readily questioned as unfair in a court of equity, where they are entered into by persons of intelligence, and in circumstances indicating caution and knowledge of what is done. *May v. Le Claire*, 11 Wal. 217.

7. If a widow receive in discharge of a debt due her husband's estate a sum less than the debt, she will not be concluded in a suit which she afterwards brings as administratrix to recover the residue, where she acts hastily, in ignorance of the full extent of her rights, and to some extent under the influence of advice, and especially where she has not yet taken out letters. *Cammack v. Lewis*, 15 Wal. 643.

8. A treasury agent having been tried by court-martial for complicity in frauds on the government, and sentenced to pay a fine, one quarter

**SETTLEMENT** — *continued.*

of which has been paid to the informer, cannot question the legality of the proceedings of the court, and recover back the amount paid, where he has voluntarily conceded that a sum larger than the amount of the fine was due, and at his request the amount of the fine has been credited to him on his account, and a portion of the balance paid to him for services subsequently rendered at his own suggestion in the matter of its recovery. *Carver v. United States*, 111 U. S. 609.

**Accord and Satisfaction** — *In general.*

See ACCORD AND SATISFACTION.

**Account** — *in general.*

See ACCOUNT — EQUITY.

**Attorney** — *Settlement with* — *Estoppel of Principal.*

See ESTOPPEL, 56.

**Bankruptcy** — *Deed when impeachable.*

See BANKRUPTCY — PRIOR TRANSACTIONS, 8, 15.

**Bar to a Claim for Greater Compensation.**

See EIGHT-HOUR LAW, 2.

**Claim against Government for Rent reserved.**

See LANDLORD AND TENANT, 3.

**Contract therefor not set aside in Equity because one of the Parties was in Want of Money, etc.**

See EQUITY — JURISDICTION, 73.

**Estates of Bankrupts** — *In general.*

See BANKRUPTCY; INSOLVENCY.

**Estates of Decedents** — *In general.*

See EXECUTOR AND ADMINISTRATOR; PARTITION, 1; REMOVAL OF CAUSES, 25.

**Guardian and Ward** — *In general.*

See GUARDIAN.

**Marriage** — *In general.*

See MARRIAGE SETTLEMENTS.

**Meaning of the Word.**

See COURT OF CLAIMS — JURISDICTION, 15.

**Survey, when not a Settlement of Boundary.**

See BOUNDARY, 3.

**Voluntary Settlements.**

See FRAUDULENT CONVEYANCES, 21 *et seq.*

**What constitutes Settlement.**

See EQUITY — JURISDICTION, 69.

**SEVERANCE** — *Effect of Severance in Defence on Right to Removal from State Court.*

See REMOVAL OF CAUSES, 78, 79.

**SHAREHOLDER** — *Rights, Duties, etc.* — *In general.*

See CORPORATION.

**SHELLEY'S CASE** — The rule in Shelley's Case applies alike to equitable and to legal estates. *Crozall v. Shererd*, 5 Wal. 268.

**SHELLEY'S CASE** — *continued.*

*Deed of Trust for Use of Wife and Children for her Life, etc.*

See HUSBAND AND WIFE, 27.

*Rule in* — *When it applies.*

See DEVISE AND LEGACY, 22, 25.

**SHERIFF** — *Powers, Duties, and Liabilities* —

*Actions against* — *Pleading.*] The powers and duties of a sheriff are ministerial and judicial, or quasi judicial; of the latter character are those that relate to the conservation of the peace. *South v. Maryland*, 18 How. 396.

2. Neither a sheriff nor the sureties on his official bond are liable to an individual in a civil action for the sheriff's failure to perform duties not merely ministerial, *e. g.*, duties as conservator of the peace, unless he has maliciously hindered the plaintiff in the enjoyment of some special right or privilege. *Ib.*

3. Replevin will not lie against a sheriff for refusal to redeliver property seized under a foreign attachment, on mere settlement of the case between the parties, without notice to him. *Livingston v. Smith*, 5 Pet. 90.

4. In Louisiana, in an action against a sheriff for taking the plaintiff's property on an execution against a third person, an allegation in the answer that the execution debtor conveyed the property to the plaintiff to defraud his creditors constitutes a defence, and to strike it out of the answer on motion of the plaintiff is error. *Hozey v. Buchanan*, 16 Pet. 215.

5. In an action on a sheriff's bond for a default in making the money on goods taken on execution, the defendants may show in defence that the goods belonged to a third person and not to the debtor. *Chapman v. Smith*, 16 How. 114.

6. A sheriff having possession of property under a writ of attachment is not bound by the judgment in a replevin suit to which he was not a party, in which he was not served with process, did not appear, and did not defend, although his under sheriff, as an individual, was made a party. *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379.

7. Where, pending proceedings for the sale of property on execution, the execution debtor is adjudged bankrupt, and the creditor and the sheriff are enjoined by the bankrupt court from selling, but the creditor obtains leave of that court for the sheriff to proceed with the sale, the court prescribing the manner in which it shall be made, and ordering the proceeds brought into court, and the sheriff sells and pays over accordingly, the creditor cannot maintain an action against the sheriff for not paying to him on the execution. *O'Brien v. Weld*, 92 U. S. 81.

8. Although the title of the assignee in bankruptcy attaches by relation as of the time of the filing of the petition, and extends to goods under an attachment levied within four months, or to their proceeds if they have been sold, whether still in the hands of the sheriff or paid over to

**SHERIFF — continued.**

the creditor, yet where the sheriff, in obedience to an order of court, sells the goods after the institution of proceedings in bankruptcy, and, execution having been issued, pays over the proceeds, he will not be liable to the assignee as for a conversion of the goods, if he have no knowledge of such proceedings until after he has so paid over. *Conner v. Long*, 104 U. S. 228.

9. In debt against a sheriff for an escape, the plea of *nil debet* puts in issue every material traversable allegation, and a verdict for the plaintiff in the language of the plea finds each fact alleged. Thus, such a verdict in such a case was held to satisfy the Mississippi statute of 1822, requiring an express finding of escape with the sheriff's consent, or through his negligence. *Long v. Palmer*, 16 Pet. 65.

10. An issue in proceedings on a sheriff's bond, on an allegation of want of due diligence, covers neglect to levy and neglect to sell on the levy. *Chapman v. Smith*, 16 How. 114.

*Authority under State Law, alleged to be unconstitutional — Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 77.

*Deed by, gives Color of Title, when.*

See LIMITATION — ADVERSE POSSESSION, 70.

*Deed executed under a Power must refer thereto.*

See POWERS, 19.

*Escape — Liability for.*

See HABEAS CORPUS, 11.

*Execution — Levy — Sale of Property, etc.*

See EXECUTION, 43.

*Judgment by Motion against, for failing to pay over.*

See FEDERAL COURTS — PRACTICE, 22.

*Plaintiff in Attachment who gives Sheriff a Bond of Indemnity — Joint Trespasser with Sheriff.*

See TRESPASS, 2.

*Removal of Suit for taking Goods of one other than Debtor.*

See REMOVAL OF CAUSES, 28.

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*Sale on Foreclosure — In general.*

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*Sales under Order of Court, etc., in general.*

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*Tax Sales — How made, etc.*

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**SHIPPING INHERITANCE — Rule not in Force in Illinois.**

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See SHIPPING — SEAMEN, 6-8.

**General Matters.**

See SHIPPING — IN GENERAL.

**Limitation of Liability of Ship-owners.**

See SHIPPING — LIMITATION OF LIABILITY.

**Master, in general — Powers, Duties, and Liabilities.**

See SHIPPING — MASTER.

**Ownership, Sale, Mortgage, etc.**

See SHIPPING — OWNERSHIP.

**Power of Consignee of Ship.**

See SHIPPING — CONSIGNEE.

**Regulation of Shipping in general.**

See SHIPPING — REGULATION.

**Seamen, in general.**

See SHIPPING — SEAMEN.

**SHIPPING — CONSIGNEE — Power of Consignee of Ship.]** A vessel was attached in a foreign port for the debt of her owner and consignor, and the consignees, to enable the vessel to proceed on her voyage, gave security for the debt and procured her release. It was held that they had authority so to do. *Boyle v. Zacharie*, 6 Pet. 635.

**SHIPPING — IN GENERAL — Carriage by Merchant Vessels — In general.**

See CARRIER.

**Collision between Vessels — In general.**

See COLLISION.

**Contract to build Ship, not maritime.**

See MARITIME LIEN, 26.

**Insurance of Vessels, etc. — In general.**

See INSURANCE — MARINE.

**Maritime Liens — In general.**

See MARITIME LIEN.

**Matters pertaining to the chartering of Ships.**

See CHARTER-PARTY.

**Pilotage — In general.**

See PILOTS.

**Salvage — Rights thereto — Owner — Master — Crew.**

See SALVAGE, 33 et seq.

**Theft of Goods belonging to Vessels in Distress.**

See COMMERCE, 49.

**Tugs and Matters of Towage — In general.**

See TUGS AND TOWAGE.

**SHIPPING — LIMITATION OF LIABILITY — Limitation of Liability of Owner — In Cases of Collision — For Injuries to Cargo, etc.**

See pl. 1-14.

**Jurisdiction — Practice — Various Courts.**

See pl. 15-24.

**SHIPPING—LIMITATION OF LIABILITY—continued.**

1. — *Limitation of Liability of Owner—In Cases of Collision—For Injuries to Cargo, etc.* Congress had power, as part of its power to regulate commerce, to pass the act of March 3, 1851 (9 Sts. 635), to limit the liability of ship-owners. *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U.S. 578.

2. Section 3 limits the liability for collisions as well as for injuries to cargo. *Norwich Company v. Wright*, 13 Wal. 104.

3. The limit of their liability is the amount of their interest in the vessel and the pending freight; and such liability may be discharged by payment of that amount into court, or by a transfer of their interest, pursuant to section 4, for apportionment among the owners of the injured vessel and the owners of cargoes; and this, although the value of such interest has been diminished, or even, it seems, although it has been destroyed, by the collision. *Ib.* And see *The Scotland*, 105 U.S. 24.

4. That act does not release the owners from the payment of costs in the district court, beyond the amount of the stipulation therefor, if they appear and make defence; nor, in case they appeal to the circuit court, from the payment of the costs taxable there, or of interest in the nature of damages occasioned by the appeal. *The Wanata*, 95 U.S. 600.

5. A ship-owner is not precluded from instituting proceedings to limit his liability for a collision, by a previous denial of all liability whatever on trial of an issue as to the cause of the collision. *The Benefactor*, 103 U.S. 239.

6. The question of fault and of general liability, determined by a decree on a libel for a collision, cannot be relitigated in subsequent proceedings by the ship-owner under the act to limit his liability. It can be reconsidered only on appeal. *Ib.*

7. Nor will such proceedings affect one who has already obtained satisfaction of his demand. *Ib.*

8. But proceedings under the decree should be stayed pending the proceedings under the statute. *Ib.*

9. In cases of collision, where both vessels are in fault, and the sum of the damage to both, therefore, is equally divided, and the owner of one becomes liable to that of the other for half the difference between their respective losses, to equalize the burden, the rule of limited liability can have no application until the balance has been struck and the sum to be paid has been ascertained, and cannot be invoked, therefore, by the owner to whom payment is to be made. His liability is extinguished by the operation of the ordinary maritime rule. *The North Star*, 106 U.S. 17.

10. The exemption of ship-owners from liability for loss by fire applies to vessels navigating the great lakes, such navigation not being

**SHIPPING—LIMITATION OF LIABILITY—continued.**

inland, within the meaning of section 7 of the act of 1851 which excludes the owners of vessels engaged in inland navigation from the benefits of the act. [CATRON, J., dissenting.] *Moore v. American Transportation Co.*, 24 How. 1.

11. Under the act an owner is not liable for a loss by fire caused wholly by negligence of his officers or agents, without any misconduct on his own part. *Walker v. Western Transportation Co.*, 3 Wal. 150.

12. The proviso to that act, allowing parties to make their own contracts as to the liability of owners, refers to express contracts. *Ib.*

13. The limitation of liability in case of the loss of property, etc., applies to a vessel on an ocean voyage, and as so applied is not unconstitutional, although the voyage be but a voyage from one port to another of the same state. The business of a vessel so engaged is commerce with foreign nations, and therefore within the power of congress to regulate. *Lord v. Goodall, Nelson, & Perkins Steamship Co.*, 102 U.S. 541.

14. A case of loss or damage by fire, not such as to afford relief under section 1 of the act of 1851, which relieves the ship-owner from all liability where the fire was not caused by his design or neglect, may yet fall under section 3, which relieves him in part from loss incurred without his privity or knowledge. The conditions of proof are different in the two cases. [FIELD and GRAY, JJ., dissenting, holding that a fire caused by his design or neglect cannot occur without his privity or knowledge.] *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U.S. 578.

15. — *Jurisdiction—Practice—Various Courts.* The district court sitting in admiralty has jurisdiction of cases arising under the act, and may make the apportionment provided for by section 4. *Norwich Company v. Wright*, 13 Wal. 104.

16. Procedure under the act explained. *Ib.*

17. Where an appeal is taken from the district to the circuit court, in a proceeding to obtain the benefit of the act, although the circuit court may remand the cause with directions for further proceedings, yet, where the rights of the parties may be better preserved by retention of the cause by the circuit court, it may be so retained, and the rules and regulations governing the district courts in such cases may be applied by the circuit court. *The Benefactor*, 103 U.S. 239.

18. Owners of a vessel wishing to avail themselves of the provisions of the act (Rev. Sts. §§ 4282-4289) are not obliged to transfer their interest to a trustee, as directed by section 4285. Section 4284 provides that they shall be liable only for the value of ship and freight, and this liability is not affected by their failure to make such transfer. If, when proceeded against *in personam*, they plead their exemption, a decree may

**SHIPPING—LIMITATION OF LIABILITY—continued.**

be rendered against them for the amount of their liability. *The Scotland*, 105 U. S. 24.

19. The right of owners of a vessel to avail themselves of the provisions of the act does not depend on a pursuance of the rules of the supreme court adopted for the regulation of practice under the act. Those rules were not intended to prevent a resort to any remedy or process available under the law, but as an aid to procedure, and hence they do not prevent a defence by way of answer to a libel, or of plea to an action. *Ib.*

20. The owner of a vessel liable for the loss of goods need not wait for a suit to be brought against him or the vessel before proceeding under Rev. Sts. §§ 4284, 4285, to obtain the benefit of the limitation of liability and an apportionment of the sum to be paid in discharge thereof, as provided by those sections. *Ex parte Slayton*, 105 U. S. 451.

21. *Semble* that a ship-owner cannot have the benefit of the limited liability act, where he has made no claim therefor in the pleadings. *The North Star*, 106 U. S. 17.

22. Under the process act of August 23, 1842 (5 Sts. 518), giving the supreme court power to prescribe and regulate the forms of process, etc., the court had power to make rules for facilitating proceedings in the district courts under the limited liability act. *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U. S. 578.

23. On the institution of proceedings in the proper district court to limit the liability of ship-owners for loss or damage to goods, etc., all proceedings on claims against the owner in other courts, whether state or federal, the proceedings in the district court being properly certified, are superseded and should be suspended; and this, whether the owner transfers his interest in the vessel and freight for the benefit of claimants, or its value is placed under control of the court by payment or stipulation, and although an injunction can issue only against the parties. [FIELD and GRAY, JJ., dissenting.] *Ib.*

24. *Quere*, as to when the value of a vessel should be taken, in a proceeding to limit the liability of her owners, under Rev. Sts. § 4283, *The Benefactor*, 103 U. S. 239.

*Jurisdiction—When the Matter in Demand is sufficient for Appellate Jurisdiction.*

See APPEAL AND ERROR—JURISDICTION, 70.

*Owner of Foreign Vessel may have Benefit in Admiralty.*

See ADMIRALTY—PRACTICE, 5.

**SHIPPING—MASTER—Power to sell Ship and Cargo in Case of Necessity—To create Lien for Supplies, etc.**

See pl. 1-17.

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**SHIPPING—MASTER—continued.**

*Power to bind Owner by Bill of Lading for Goods not received—Other Powers.*

See pl. 18-27.

*Miscellaneous Duties and Liabilities.*

See pl. 28-30.

**1.—Power to sell Ship and Cargo in Case of Necessity—To create Lien for Supplies, etc.]**

The master has power to sell both vessel and cargo in certain cases of absolute necessity; but the circumstances under which the sale is made are always open to close scrutiny. *Post v. Jones*, 19 How. 150.

2. And the sale, to be valid, must be where there may be a market for the thing sold, money to pay for it, and a chance for competition. A sale, therefore, on a bleak coast of Belhrings Straits, where there was no competition, and where no money was paid, the purchasers bidding a nominal sum, instead of becoming salvors, is void. *Ib.*

3. But if, in such case, the vessel and cargo be derelict and lost but for the aid of the purchasers, such a sale will not defeat their right to salvage. *Ib.*

4. The sale of a stranded vessel by the master is valid, if made from necessity and in good faith. *New England Insurance Co. v. The Sarah Ann*, 13 Pet. 387.

5. Good faith requires of the master the use of his best discretion, the acquirement of the best obtainable local information, and the employment of all reasonable means to get the vessel afloat and out of danger. *Ib.*

6. The mere fact that the vessel was afterwards relieved, and the cost of removal and repairs not very great, will not disprove the necessity for a sale, or the competency of the master or his advisers. *Ib.*

7. The necessity must arise from actual impending peril to the vessel, from which it is probable that she will be destroyed. *Ib.*

8. The right of the master to sell is not limited to cases of necessity in foreign countries, or out of the state in which the owners reside; but he should not sell without giving the owners notice, if circumstances admit of the necessary delay. *Ib.*

9. His right to sell extends to the sails and rigging, although landed, if a sound discretion require them to be sold when the hull is sold. *Ib.*

10. To justify a sale of the vessel by the master in a distant port, in the course of the voyage, necessity for the sale and good faith in making it must concur; and concurrence must be proved by the purchaser. *The Amelie*, 6 Wal. 18.

11. Where the master is in such a situation that he cannot communicate with the owners, he may sell a part of the cargo if necessary, to raise means to make necessary repairs. *The Star of Hope*, 9 Wal. 203.

12. The question of necessity is to be determined by the circumstances in which the master

**SHIPPING — MASTER — continued.**

is placed and the perils to which the property is exposed, and may exist where a vessel owned in Amsterdam is sold at Port au Prince, where she had put in partially disabled, after a careful survey, under authority of the Dutch consul, by the British Lloyd's agent, an agent of the American underwriters, and three captains of vessels there in port, who agree that the vessel is not worth repairing and advise a sale, although the vessel be subsequently repaired at an expense about equal to her value and go on to the port of destination. *The Amelie*, 6 Wal. 18.

13. A sale of a vessel by the master will not be ratified by mere abandonment to the insurer, where the circumstances were not such as to authorize the sale. *Ward v. Peck*, 18 How. 267.

14. Although, by the law of England, the master has no power to create a lien on the vessel for supplies or repairs obtained in a foreign port, except by a bottomry bond, it is held otherwise in the federal courts, as it was by the ancient law of maritime nations. *Thomas v. Osborn*, 19 How. 22.

15. But the master cannot create such a lien except for supplies and repairs, nor unless it is necessary to pledge the vessel for them. *Ib.*

16. And it is for him who furnishes supplies to see to it that there is an apparent necessity, and that what is furnished is for the use of the vessel. *Ib.*

17. Thus, where the master has proper funds which it is his duty to pay for the supplies or repairs, and the one who furnishes the supplies or makes the repairs has knowledge, or means which with due diligence might be knowledge thereof, there can be no such lien. *Ib.*

18. — *Power to bind Owner by Bill of Lading for Goods not received — Other Powers.* Neither the master of a steamboat nor its shipping agents at points where it touches to receive and deliver cargo, can bind it or its owner by giving a bill of lading for goods not received; and such a bill is void in the hands of a transferee in good faith and for value. *Pollard v. Vinton*, 105 U. S. 7.

19. Although in general the vessel is bound by a contract of affreightment, and the owner, as well general as special, by the bill of lading, neither the general owner nor his interest can be bound by a false and fraudulent bill of lading executed by the master at the instigation of the special owner for cargo not received, the general owner being no party to the fraud. *Hickox v. Buckingham*, 18 How. 182.

20. Thus, a consignee who makes advances in good faith on such a bill of lading cannot hold the vessel liable as against such general owner. *Ib.*

21. Nor is the general owner estopped to deny the receipt of cargo by the master. *Ib.*

22. Although the master may compromise or refer a question of salvage if he cannot consult the owner without injurious delay, yet his con-

**SHIPPING — MASTER — continued.**

duct therein will be closely scrutinized, and his contracts will not bind the owner, unless they appear to be such as a discreet owner would make in like circumstances; and the burden of proof is on those who set up his authority. *Houseman v. The North Carolina*, 15 Pet. 40.

23. If he submit to arbitration, it must be proved that the arbitrators were suitable persons, and their proceedings fair. *Ib.*

24. The master has power to decide, on the facts before him, whether or not a jettison is necessary. *Laurence v. Minturn*, 17 How. 100.

25. A master and supercargo who has agreed to receive certain wages, a commission, and a share of the profits, "in full of all services and privileges," cannot traffic on his own account for his own benefit. *Mathewson v. Clarke*, 6 How. 122.

26. The duty of a master to the owners does not compel him to violate good faith, even to an enemy, in order to preserve the vessel. *Hannay v. Eve*, 3 Cranch, 242.

27. Drafts by the master of a vessel on her owner do not bind the vessel unless, independently of the drafts, she would be bound for the debt, even though they express on their face that they are "recoverable against the vessel, freight, and cargo;" as, for instance, where drafts are drawn pursuant to a fraudulent conspiracy between the master and the drawee, and indorsed to one who, without knowledge of the fraud, in good faith pays value for them. *The Woodland*, 104 U. S. 180.

28. — *Miscellaneous Duties and Liabilities.* The master of a vessel which touches at a foreign port to obtain advices, but does not enter or transact any business, is not liable to the penalty imposed by the act of February 28, 1803, § 2 (2 Sts. 203), for omitting to deposit his register with the American consul, there being no "arrival" within the meaning of that act. *Harrison v. Vose*, 9 How. 372.

29. The master of a steamboat, held not liable for injury to flour arising, possibly, from bad stowage on reloading after having unloaded, to pass a bar, it being the duty of the mate to see to the loading. *Mephram v. Biessel*, 9 Wal. 370.

30. Where the master is general owner and also owner for the voyage, he cannot commit barratry. *Marcadier v. Chesapeake Insurance Co.*, 8 Cranch, 39.

**Duties of Master sailing for Blockaded Port — Inquiry.**

See BLOCKADE, 11 *et seq.*

**Hostile Trade — Necessity for Funds to pay Expenses of Ship.**

See TRADING WITH ENEMY, 11.

**Liability of Master for Escape of Slaves.**

See BAILMENT, 1.

**May refuse to take Goods — When.**

See CHARTER-PARTY, 6.

**SHIPPING — MASTER — continued.**

*Power to bind the Owner by Bill of Lading for Goods not received.*

See **BILL OF LADING; CARRIER — CONTRACT OF CARRIAGE.**

*Sale by Master in Case of Loss — What justifies.*

See **INSURANCE — MARINE, 94 et seq.**

*Voluntary Stranding by Master, etc., to save Associated Interests.*

See **AVERAGE.**

**SHIPPING — OWNERSHIP — Ownership — Sale and Transfer — Mortgage — Part Owners — Ship's Papers.]** A bill of sale is not necessary to pass title in case of a justifiable sale of a vessel by the master in a foreign port. *The Amelie*, 6 Wal. 18.

2. In such case the purchaser takes clear of all liens which attach to the proceeds. *Ib.*

3. Although a bill of sale accompanied by possession makes title *prima facie*, it was here held that, in the circumstances, there should be good faith and a valuable consideration. *Hozey v. Buchanan*, 16 Pet. 215.

4. Under the civil code of Louisiana, the seller of a vessel, as of other chattels, is responsible for secret defects, unknown either to him or to the purchaser, and the purchaser may return the vessel and sue for the consideration, or retain it and sue for damages. *Bulkley v. Honold*, 19 How. 390; *Sturgis v. Honold*, *Id.* 393.

5. Sales of vessels are within the provisions of the code regulating sales generally, and are not governed by the general commercial law. *Bulkley v. Honold*, 19 How. 390.

6. What will make out the defence of a *bona fide* purchaser without notice. *Calais Steamboat Co. v. Scudder*, 2 Black. 372.

7. Under the act of July 29, 1850 (9 Sts. 440), providing that a mortgage, etc., of a vessel, to be valid against a subsequent *bona fide* purchaser or mortgagor, shall be recorded in the office of the collector of customs where the vessel is registered or enrolled, such a record by its own force gives the mortgagee a preference over subsequent purchasers or mortgagors, without regard to any formalities prescribed by a state statute to give effect to chattel mortgages. *White's Bank v. Smith*, 7 Wal. 646.

8. The port where such record should be made is the home port of the vessel, whether it be the port of last registry or enrolment, or not. *Ib.*

9. That act is within the power of congress to regulate commerce. *Ib.*

10. The mortgage of a vessel, duly recorded under an act of congress, cannot be defeated by a subsequent attachment under a state law providing that such a mortgage shall not be valid without delivery of possession or a record otherwise made. *Aldrich v. Aetna Insurance Co.*, 8 Wal. 491.

11. A mortgage of a vessel of the United

**SHIPPING — OWNERSHIP — continued.**

States is not rendered invalid, as against the parties and persons having actual notice, by a failure to record it. *Moore v. Simonds*, 100 U. S. 145.

12. A mortgagee out of possession is not liable for repairs; and it makes no difference that the vessel is registered in his name. *Morgan v. Shinn*, 15 Wal. 105.

13. If a joint owner purchase the interest of his co-owner, agreeing to pay the debts and liabilities of the vessel, he will be held to pay a note before given by such co-owner in their joint name, for a sum agreed on as due for non-delivery of cargo, with his knowledge and without dissent on his part, although there were no partnership between them. *Newell v. Nizon*, 4 Wal. 572.

14. A sale is never directed on a dispute between owners; the majority may employ the vessel on a stipulation for her safe return; and if they decline to employ her, the minority may do so on like terms. *The Orleans v. Phœbus*, 11 Pet. 175.

15. Ship's papers, and documents accompanying property, found on board the private ships of foreign nations, are but *prima facie* evidence of property, and of no force when shown to be fraudulent. *United States v. The Amistad*, 15 Pet. 518.

**Lien on Ships in general — Advances — Repairs — Supplies.**

See **MARITIME LIEN.**

**Lien on Vessel under Mortgage — Federal Question.**

See **ERROR TO STATE COURT — JURISDICTION, 85.**

**Owner bound to keep Vessel in Repair.**

See **CHARTER-PARTY, 3.**

**Owner's Lien on Return Cargo cannot be waived nor displaced by Charterer and Master for Advances to purchase Cargo.**

See **CHARTER-PARTY, 24.**

**Owner pro hac vice — What constitutes.**

See **CHARTER-PARTY, 19 et seq.**

**Pledge for Repairs, Supplies, etc. — In general.**

See **BOTTOMRY AND RESPONDENTIA.**

**Seizure and Condemnation of Vessel as Prize — Liens and Mortgages displaced.**

See **CAPTURE.**

**Transfer of Title — Proof.**

See **PRIZE — PRACTICE, 46.**

**SHIPPING — REGULATION — Registration — Enrolment — License — Tonnage Duties — Penalties and Forfeitures, and their Remission — Practice, Evidence, etc.**

See pl. 1-30.

**Regulations for Security of Passengers.**

See pl. 31, 32.



**SHIPPING — REGULATION — continued.**

1. — *Registration — Enrolment — License — Tonnage Duties — Penalties and Forfeitures, and their Remission — Practice, Evidence, etc.* Under the registry act of December 31, 1792, § 4 (1 Sts. 289), the absolute property in a vessel does not vest in the United States on the taking of the false oath. Some act must be done manifesting the intention of the government to take the vessel and not its value. *United States v. Grundy*, 3 Cranch, 338.

2. If the government elect to take the value of the vessel, it can be recovered only in an action against the person who committed the offence; and the facts must be specially declared on. *Ib.*

3. Section 27 of that act, inflicting a forfeiture for the fraudulent use of a certificate of registry, applies as well to vessels that have not as to those that have been previously registered. *The Neptune*, 3 Wheat. 601.

4. On a libel under that act for that offence, it was held that, in the circumstances, the vessel was forfeited. *Ib.*

5. The transfer of a registered American vessel to a foreign subject, in a foreign port, for the purpose of evading the revenue laws of the foreign country, on an understanding for reconveyance to the person so transferring, works a forfeiture of the vessel under section 16, where the certificate of registry is not delivered up, as provided in section 7. *The Margaret*, 9 Wheat. 421.

6. The proviso of section 16 applies to the case of a part owner of the ship only, not to that of a sole owner. *Ib.*

7. A registered vessel which continues to use its register after such a transfer is liable to forfeiture under section 27 for using a register to the benefit of which it was not entitled. *Ib.*

8. Where the oath described one of the owners as "of the city of New York," when he was domiciled in England, it was held that the vessel was forfeited under section 4. *The Venus*, 8 Cranch, 253.

9. On a libel for a forfeiture under section 27, circumstances of suspicion, sufficient, in the opinion of the court, to call for explanation, being shown, and the claimant neglecting to produce documents in his possession which would make a clear case for the government or for himself, the vessel was condemned. [JOHNSON, J., dissenting.] *The Luminary*, 8 Wheat. 407.

10. If an American vessel be sold at sea to an American citizen, she is not thereby forfeited. She is an American vessel on arriving in port; and a new register need not and cannot be taken until the old one is surrendered. *United States v. Willings*, 4 Cranch, 48.

11. The act of December 23, 1852 (10 Sts. 149), authorizing foreign vessels wrecked in the United States, and afterwards purchased and repaired by citizens thereof, to be registered or enrolled, is to be construed as a part of our system

**SHIPPING — REGULATION — continued.**

of registration and enrolment. *The Mohawk*, 3 Wal. 566.

12. Under the act of March 3, 1831 (4 Sts. 487), regulating the foreign and the coasting trade on our northern frontiers, an enrolment of a vessel engaged therein is equivalent to both enrolment and registry. *Ib.*

13. And by the proviso of section 3 of that act the penalty of forfeiture prescribed by section 27 of the registry act of 1792, in case of the fraudulent use of a certificate of registry, is applied in case of a like use of a certificate of enrolment. *Ib.*

14. Hence, under those acts, a Canadian vessel scuttled, raised, and repaired, in order to an enrolment under the act of 1852, and finally fraudulently so enrolled, is liable to forfeiture. *Ib.*

15. A vessel built in Canada but owned by citizens of the United States, and engaged in bringing the products of Canada into ports of the United States, is subject to forfeiture under the act of March 1, 1817 (3 Sts. 351), which provides that goods, etc., shall not be imported, except in vessels of the United States or in foreign vessels belonging to citizens or subjects of the country in which the goods are produced. Such a vessel is not a vessel of the United States, without registration; nor, in the absence of papers, can she be deemed a Canadian vessel, and so within the proviso of that act which declares that the regulation shall not extend to the vessels of a nation having no like regulation. *The Merriut*, 17 Wal. 582.

16. A steamboat employed in towing and lightering between the lower bay of Mobile and the city is engaged in the coasting trade within the meaning of the act of February 18, 1793 (1 Sts. 305), providing for the enrolment, etc., of vessels engaged in such trade. *Foster v. Davenport*, 22 How. 244.

17. The license to a coasting vessel is not intended to confer the national character, but to give permission to carry on the coasting trade. *Gibbons v. Ogden*, 9 Wheat. 1.

18. A vessel licensed for the coasting trade has a right to land at all customary landings on a navigable river, in the usual pursuit of commerce. *Conway v. Taylor*, 1 Black, 603.

19. The enrolment of a bill of sale of a vessel is not necessary to pass the title, but only to entitle the vessel to the national character. *Hozey v. Buchanan*, 16 Pet. 215.

20. If part of an American vessel be sold by parol while at sea, and resold to the vendor on her arrival in port and before entry, she does not lose her American character, and no new register is necessary. *United States v. Willings*, 4 Cranch, 48.

21. On an information to enforce a forfeiture of a vessel for violation of the registry laws, the offence must be proved beyond reasonable doubt, the rule being the same as in all criminal cases. *The Burdett*, 9 Pet. 682.

22. The plea of necessity or distress, resorted

**SHIPPING — REGULATION — continued.**

to as an answer to a case which calls for a forfeiture, must be made out by the claimant. *The Josefa Segunda*, 5 Wheat. 338.

23. What is proof of foreign ownership. *The Burdett*, 9 Pet. 682.

24. By the general maritime law, vessels are responsible for the unlawful acts of their masters and crews, even to the extent of forfeiture under positive law. *The Malek Adhel*, 2 How. 210.

25. The French tonnage duty act of May 15, 1820 (3 Sts. 605), did not inflict forfeiture of the vessel for non-payment of the tonnage duty, but left the duty to be collected as provided in the collection act of May 2, 1799 (1 Sts. 648). *The Apollon*, 9 Wheat. 362.

26. A licensed vessel is liable to forfeiture under the collection act of February 18, 1793, §§ 32, 33 (1 Sts. 316), for being employed in a trade other than that for which she is licensed. *The Active v. United States*, 7 Cranch, 100.

27. But her cargo is not, if not subject to duty, and if not the property of the owner, the master, or a mariner of the vessel. *Ib.*

28. A vessel cannot be seized for violation of a law of the United States after expiration of the law, unless some special provision therefor be made by statute. *The Helen*, 6 Cranch, 203.

29. The provision of Rev. Sts. § 5294, authorizing the secretary of the treasury to remit penalties for violation of the laws relating to steam vessels, and to discontinue prosecutions to recover such penalties, is not an unconstitutional interference with the president's power to pardon. *The Laura*, 114 U. S. 411.

30. Nor can an informer deny the right of the secretary to remit the penalty after a suit for its recovery has been instituted, the statute in terms declaring that the informer's rights are held subject to the secretary's power of remission. *Ib.*

31. — *Regulations for Security of Passengers.* The act of March 30, 1852 (10 Sts. 72), "to provide for the better security of the lives of passengers on board of vessels propelled in whole or part by steam," etc., does not exempt the owners and master of a steam vessel, and the vessel, from liability for injuries caused by the negligence of its pilot or engineer, but gives an additional remedy against those officers. *Sherlock v. Alling*, 93 U. S. 99.

32. A canal-boat laden with coal for transportation, having on board the master, with his family, is not a "barge carrying passengers," within the meaning of § 4492, Rev. Sts., which requires that such a barge, while in tow of a steamer, shall be provided with "fire-buckets, axes, life-preservers, and yawls." *Eastern Transportation Line v. Cooper*, 99 U. S. 78.

*Certificate of Registry admissible in Action on Policy to prove Ownership.*

See INSURANCE — MARINE, 147.

*Duty of Tonnage, in general.*

See TONNAGE DUTY.

**SHIPPING — REGULATION — continued.**

*Invalid Shipping Regulation.*

See COMMERCE, 59.

*Liability of Collector for detaining Ship's Papers.*

See COLLECTOR OF CUSTOMS, 5.

*Municipal Power to regulate Ships in Port.*

See COMMERCE, 18, 19; MUNICIPAL CORPORATION — POWERS IN GENERAL, 12.

*Neglect of Master to insert in Manifest Description of Foreign Goods — No Ground for Forfeiture under Act of 1793.*

See DUTIES — PENALTIES AND FORFEITURES, 12, 13.

*Ocean Steamer — Where taxable.*

See TAX — POWER, 44, 45.

*Passengers Head-money.*

See COMMERCE, 38-48.

*Piracy forfeits National Character, and subjects Ship to Forfeiture.*

See PIRACY, 6.

*Sale of Ship suited to Privateering not a Breach of Neutrality, etc.*

See NEUTRALITY, 1.

*Tax on Receipts under Internal Revenue Acts.*

See INTERNAL REVENUE — PERSONS AND THINGS TAXED, 104 et seq.

**SHIPPING — SEAMEN — Wages — Lien for Wages — Agreements — Commissioner's Fees.]**

Seamen who contracted for a legal, but were carried on an illegal, voyage, and were thereby subjected to imprisonment in a foreign port, held entitled to their wages from the time of their shipment to that of their return, deducting wages earned in an intermediate employment. *Sheppard v. Taylor*, 5 Pet. 675.

2. A seaman who ships for a voyage in violation of the acts prohibiting the slave trade is not entitled to his wages out of the proceeds of the forfeited vessel. *The St. Jago de Cuba*, 9 Wheat. 409.

3. The claims of seamen for wages are to be preferred to the claim of the government for a forfeiture, where the parties were innocent of all knowledge of or participation in the illegality of the voyage. *Ib.*

4. The seaman's lien for wages attaches on money paid by a foreign government for the wrongful seizure of the vessel and the loss of the freight, and may be enforced in the admiralty against it, although it be in the hands of an assignee of the owner with notice. *Sheppard v. Taylor*, 5 Pet. 675.

5. The master has no lien on the vessel for wages. *The Orleans v. Phœbus*, 11 Pet. 175.

6. It is not necessary, whether under the revised statutes or under the acts of June 7, 1872, January 15, 1873 (17 Sts. 262, 410), and June 9, 1874 (18 Sts. 64), regulating the shipping and discharge of merchant seamen, that the agreement which, with certain exceptions, the

**SHIPPING — SEAMEN — continued.**

master of a vessel bound from a port in the United States to a foreign port is required to make with each of his crew, should be signed in the presence of a shipping commissioner, where the voyage is to a port in the West India Islands. *United States v. The Grace Lothrop*, 95 U. S. 527.

7. A vessel engaged in coastwise voyages between Atlantic ports of the United States is not within the purview of the act of June 7, 1872 (17 Sts. 262); and one who, although not a shipping commissioner, ships and engages seamen for such a voyage, does not violate the provisions of that act. *United States v. Smith*, 95 U. S. 536.

8. The exemption from the payment of further fees, under Rev. Sts. § 4513, which provides that seamen may "reship and sail in the same vessel on another voyage without the payment of additional fees to the shipping commissioner by either the seaman or the master," is not limited to one other voyage immediately following that for which fees were paid, but extends to all subsequent reshipments following continuously. *Young v. American Steamship Co.*, 105 U. S. 41.

**SIGNAL SERVICE — Record of Officer — Admissible in Evidence.**

See EVIDENCE — DOCUMENTARY, 27.

**SIGNATURE — Contract — What Contracts require Signature — What sufficient.**

See CONTRACT — WHAT CONSTITUTES, 16, 17.

**SINGLE BILL — Assignment — Effect.**

See ASSIGNMENT — Effect.

**SINGLE SHIP — What is, within Meaning of Prize Act of 1864.**

See CAPTURE — CAPTOR'S RIGHTS, ETC., 10.

**SLANDER — In general.**

See LIBEL AND SLANDER.

**SLAUGHTER-HOUSES — Regulation by States — Police Power.**

See STATES — RIGHTS AND POWERS, 16.

**SLAVE TRADE — Legality — What constitutes an Offence under Acts prohibiting — Matters of Pleading and Practice.]** The slave trade is not prohibited by the law of nations. *The Antelope*, 10 Wheat. 66.

2. An American cruiser cannot lawfully capture a foreign vessel engaged in the slave trade in violation of the laws of its own country. One nation cannot execute the penal laws of another. *Ib.*

3. Under the slave-trade act of 1794 (1 Sts. 347), the forfeiture attaches when the original voyage is begun in the United States, and is not

**SLAVE TRADE — continued.**

avoided by a subsequent colorable transfer to a foreign subject and the beginning of a new voyage from a foreign port. *The Plattsburgh*, 10 Wheat. 133.

4. It is not necessary, to incur the forfeiture, that the equipment for the voyage be completed in a port of the United States; it is enough if any preparation be made for such unlawful purpose. *Ib.*

5. What was an offence incurring a forfeiture under that act. *The Caroline v. United States*, 7 Cranch, 496.

6. It is not necessary to a forfeiture under the slave-trade acts of March 23, 1794 (1 Sts. 347), and of March 2, 1807 (2 Sts. 426), that the vessel should be completely fitted for sea, but only that she should be so far fitted as clearly to manifest the intention. *The Emily*, 9 Wheat. 381.

7. The owner of slaves taken on an American vessel captured in the act of transporting them from one foreign port to another, contrary to the provisions of the act of May 10, 1800 (2 Sts. 71), is, in general, precluded from claiming them in the federal courts, although they were held in servitude according to the laws of the owner's country. *The Merino*, 9 Wheat. 391.

8. But if the offending vessel when seized and brought in for such offence were taken from the possession of a non-commissioned captor, who had seized her, and was then taking her in for the same offence, the owner of the slaves may claim them, section 4 of that act applying only to persons interested in the voyage in which the vessel is employed when captured. *Ib.*

9. The offence contemplated by the act of May 10, 1800, §§ 2, 3 (2 Sts. 701), is the voluntary service of an American citizen on a vessel bound to the coast of Africa for the purpose of taking and transporting slaves to some foreign country with knowledge that the vessel is so employed; and it makes no difference that no slaves are actually transported. *United States v. Morris*, 14 Pet. 464.

10. The act of February 28, 1803 (2 Sts. 283), "to prevent the importation of certain persons into certain states where by the laws thereof their admission is prohibited," held not in force in the territory of Orleans. *The Amiable Lucy*, 6 Cranch, 330.

11. The act of March 2, 1807, § 7 (2 Sts. 428), does not confer on the seizing officer a right to participate in the proceeds of vessels or cargoes seized for being engaged in the slave trade, if he be not an officer of an armed vessel or of a revenue cutter of the United States, and make the seizure as such. *The Josefa Segunda*, 10 Wheat. 312.

12. Under the Louisiana statute of March 13, 1818, only the commanding officer of such vessel or cutter is entitled so to participate. *Ib.*

13. It is sufficient to convict the owner of a vessel indicted under the act of April 20, 1818 (3 Sts. 450), for fitting her out for the slave

**SLAVE TRADE — continued.**

trade, that he fitted out the vessel through his agents, although not personally present. *United States v. Gooding*, 12 Wheat. 460.

14. And any preparations, however incomplete, which clearly manifest and accompany an intent to prosecute a voyage for such trade, constitute a fitting out within the meaning of that act. *Ib.*

15. An offence under that act is a misdemeanor, and all concerned therein, whether present or absent, are principals. *Ib.*

16. That act does not apply to the bringing home to this country of a person of color who, having been domiciled here as a slave, has been abroad with his master. *United States v. Skiddy*, 11 Pet. 73.

17. An indictment under that act for fitting out a vessel for the slave trade, alleging that act, need not specify the particulars of the fitting out. *United States v. Gooding*, 12 Wheat. 460.

18. But it must allege that the vessel was fitted out within the jurisdiction of the United States. *Ib.*

19. An allegation therein of an intent that the vessel "should be employed" in the slave trade, is defective; it should be in the language of the statute, "with intent to employ," etc. *Ib.*

20. Negroes who have lawfully regained their liberty by taking possession of a Spanish vessel on which they were illegally confined, should not be transported to the coast of Africa under the act of March 3, 1819 (3 Sts. 532), although taken possession of and brought into a port of the United States by a government vessel. *The Amistad*, 15 Pet. 518.

21. Africans taken with a captured slaver, and not proved to have been unlawfully taken by the slaver from the possession of a foreigner, were ordered to be delivered to the United States. *The Antelope*, 10 Wheat. 66; *The Antelope*, 12 Wheat. 546.

22. And they should be delivered unconditionally and without the payment of expenses. *The Antelope*, 12 Wheat. 546.

23. Possession of slaves by a foreign slaver at the time of an illegal capture, considered as proof of property therein. *The Antelope*, 10 Wheat. 66.

24. Where a vessel partially equipped for the slave trade in a port of the United States went to a foreign port to complete her equipment and thence proceeded on her voyage, but put back into a home port for repairs, she was held liable to seizure and condemnation. *The Reindeer*, 2 Wal. 383.

25. Where persons trade to a coast on which the slave trade is carried on, they should keep their operations so clear and distinct in character as to repel the imputation of a purpose to engage therein. *The Kate*, 2 Wal. 350; *The Sarah*, Id. 366; *The Weathergage*, Id. 375.

26. What is sufficient evidence to justify the forfeiture of a vessel as prepared for the purpose of carrying on the slave trade, or as being engaged therein. *Ib.*; *The Reindeer*, 2 Wal. 383.

**SLAVE TRADE — continued.**

*Forfeiture under Act of 1807 — Pleading — Charge in Alternative.*

See ADMIRALTY — PLEADING, 10, 11.

**SLAVERY — In general — Prohibition — Conflict of Laws — Sales, etc.**

See pl. 1-18.

*Manumission — What constitutes, etc.*

See pl. 19-29.

*Fugitive Slave Laws.*

See pl. 30-43.

1. — *In general — Prohibition — Conflict of Laws — Sales, etc.* Section 8 of the act of March 6, 1820 (3 Sts. 548), prohibiting slavery in the territory north of thirty-six degrees, thirty minutes, north latitude, which was ceded by France, is unconstitutional in assuming to deprive persons of their property without due process of law and without compensation. [McLEAN and CURTIS, JJ., dissenting.] *Scott v. Sandford* [*Dred Scott Case*], 19 How. 393.

2. A slave did not acquire freedom by being carried to reside indefinitely with his master in that territory. [McLEAN and CURTIS, JJ., dissenting.] *Ib.*

3. Nor did residence with his master in a state where slavery was forbidden discharge him after his return to a slave state, the law of the latter state, in such case, being conclusive of his status as to freedom or slavery. [McLEAN and CURTIS, JJ., dissenting.] *Ib.*

4. The rule *partus sequitur ventrem* is universally followed, unless there be something in the terms of the instrument which disposes of the mother, separating the issue from her. *Williamson v. Daniel*, 12 Wheat. 568; *McCutchen v. Marshall*, 8 Pet. 220. See *Fowler v. Merrill*, 11 How. 375.

5. A slave brought into Maryland does not become free through the neglect of the master to prove to the satisfaction of the naval officer, or collector, that such slave had resided three years in the United States, although such proof be required by a statute of that state prohibiting the bringing in of slaves, except in cases of such residence. *Scott v. Ben*, 6 Cranch, 3.

6. The Maryland statute, prohibiting the importation of slaves "for sale or to reside" does not apply to temporary residence, nor to importation by a bailee. *Henry v. Ball*, 1 Wheat. 1.

7. What, under the act of June 24, 1812 (2 Sts. 755), and the Maryland statute of 1796, is such a removal into Washington County in the District of Columbia, as entitles a slave to freedom. *Lee v. Lee*, 8 Pet. 44.

8. Although the two counties of the District of Columbia are under the same political organization, yet as the laws of Virginia were continued in force in Alexandria County, and the laws of Maryland in Washington County, a person who would be free under the laws of Maryland on being brought within that state, is entitled to his

**SLAVERY — continued.**

freedom on being purchased in Alexandria by a resident of Washington, and brought into the latter county for sale; and it makes no difference that by the laws of Maryland the owner could not manumit him because of his age. *Rhodes v. Bell*, 2 How. 397.

9. In Virginia, by the statute of 1758, a gift of a slave was invalid, unless in writing recorded. *Spiers v. Willison*, 4 Cranch, 398; *Ramsay v. Lee*, Id. 401.

10. Under the Virginia statute of December 17, 1792, a slave did not become free by being brought into that state, if his master, within one year thereafter, removed thither to reside, and took the oath prescribed by the act. *Scott v. London*, 3 Cranch, 324.

11. The provision in the constitution of Mississippi of 1832, concerning the introduction of slaves for sale was directory to the legislature merely, and not operative as a law of prohibition, *proprio vigore*. [STORY and MCKINLEY, JJ., dissenting.] *Groves v. Slaughter*, 15 Pet. 449; *Rowan v. Runnels*, 5 How. 134; *Truly v. Wanzer*, 5 How. 141; *Sims v. Hundley*, 6 How. 1; *Hardeman v. Harris*, 7 How. 726.

12. Prior to the abolition of slavery in Mississippi, a contract there made between a slave and his master neither imposed obligations nor conferred rights on either party. *Hall v. United States*, 92 U. S. 27.

13. What amounts to proof of the ownership of slaves. *Amis v. Myers*, 16 How. 492.

14. In a suit for freedom, the record of a suit between the plaintiff's mother, brother, and sister, and the defendant's intestate, in which the freedom of the plaintiffs was established, is competent evidence. *Vigel v. Naylor*, 24 How. 208.

15. Its probative force is increased by parol testimony that the plaintiff, when a young child, and her mother, were in the possession of the intestate, that they were brought from the house of one who by his will manumitted all his slaves, and that under that will the mother received her freedom. *Ib.*

16. A law which entirely destroys the remedy on an existing contract, as, for instance, an amendment to a constitution which provides that no court shall have, and that the legislature shall not give, jurisdiction to enforce a contract the consideration of which was a slave or the hire thereof, impairs the obligation, and is so far void. [CHASE, C. J., dissenting from the application to this case.] *White v. Hart*, 13 Wal. 646; *Osborn v. Nicholson*, Id. 654. And see *Sevier v. Haskell*, 14 Wal. 12.

17. A promissory note given for a slave in a slave state before slavery was abolished is a valid contract, the obligation of which the state may not impair. [CHASE, C. J., dissenting.] *White v. Hart*, 13 Wal. 646; *Osborn v. Nicholson*, Id. 654.

18. A note given in Louisiana in 1861 for the price of slaves is valid, and a suit is main-

**SLAVERY — continued.**

tainable thereon, notwithstanding a subsequent statute or constitutional amendment declaring such contracts void. *Boyce v. Tabb*, 18 Wal. 546.

19. — *Manumission — What constitutes, etc.* In Maryland, a devise of property, real or personal, by a master to his slave, is a manumission of the latter by necessary implication. *Le Grand v. Darnall*, 2 Pet. 664.

20. In that state, a slave eleven years old was held able to gain a sufficient livelihood, within the meaning of the statute of 1796, and to be manumitted by the will of his master. *Ib.*

21. In Maryland, a testator may charge his real estate with the payment of his debts in order to render a manumission of his slaves by the will effectual under the statute of 1796, as without prejudice to his creditors. *Fenwick v. Chapman*, 9 Pet. 461.

22. In Maryland, an order of the orphans' court empowering an executor to sell the personal estate of a testator, held not to enable him to sell slaves manumitted by the will, the real estate being sufficient to pay the debts. *Ib.*

23. In Maryland, the manumission of a mother and her infant child is allowed, the former being in good health and able to maintain the latter. *Wallingsford v. Allen*, 10 Pet. 583.

24. A bequest of slaves in Maryland, providing that the legatee should "not carry them out of the state . . . or sell them to any one," coupled with a "will and desire," that in such case the slaves should be free for life, held a valid conditional limitation of freedom, and to take effect as to one of them on sale of him by the legatee. *Williams v. Ash*, 1 How. 1.

25. In that state, a bequest of freedom to a slave is a specific legacy, and may be made on the same conditions and limitations on which the property in him may be limited over to a third person. *Ib.*

26. In Maryland, under the statute of 1796, a deed of manumission not recorded within six months was void, and on the cession of the District of Columbia that law was adopted as the law of Washington County. *Müller v. Herbert*, 5 How. 72.

27. In Tennessee, under the statute of 1801, the executor of a will which directs the manumission of the slaves of the testator may apply to the county court, as a living owner might, for a sanction of such manumission, and the court may sanction it on his application. *McCutchen v. Marshall*, 8 Pet. 220.

28. The right to freedom under a will may be tried in an action at law against the executor at the instance of the manumitted slave. *Fenwick v. Chapman*, 9 Pet. 461.

29. And in such an action the executor may admit the existence of real assets sufficient to pay the debts of the testator. *Ib.*

30. — *Fugitive Slave Laws.* The fugitive slave law of February 12, 1793 (1 Sts. 302), is

**SLAVERY — continued.**

constitutional. *Prigg v. Pennsylvania*, 16 Pet. 539; *Jones v. Van Zandt*, 5 How. 215.

31. It is not in conflict with the ordinance of 1787 for the government of the territory northwest of the Ohio. *Jones v. Van Zandt*, 5 How. 215.

32. Any overt act showing an intention to elude the master or his agent, and calculated to attain that end, is a "harboring," within the meaning of that law. *Ib.*

33. It was not necessary, under that act, that the notice that the person harbored was a fugitive from justice should be in writing, nor published in a newspaper; it might be acquired from the slave himself. *Ib.*

34. Nor was it necessary that the notice should be preceded or accompanied by a claim. *Ib.*

35. Subsequent recovery of the slave was no bar to an action for the penalty for harboring him. *Ib.*

36. The declaration herein for the penalty for harboring a fugitive slave, contrary to the act of February 12, 1793 (1 Sts. 302), held to sufficiently aver that the slave was a fugitive from labor and that the defendant harbored him, and to be otherwise sufficient. *Ib.*

37. Section 4 of that act was repealed as to the penalty thereby imposed by the act of September 18, 1850 (9 Sts. 462). *Norris v. Crocker*, 13 How. 429.

38. That act, known as the "fugitive slave law," is constitutional. *Ableman v. Booth*, 21 How. 506.

39. An action thereunder for a penalty, pending at the time of the repeal, was thereby barred. *Norris v. Crocker*, 13 How. 429.

40. A commissioner of the United States had authority to examine and commit, for the action of the district court and its grand jury, a prisoner charged with an offence against the fugitive slave law of 1850. *Ableman v. Booth*, 21 How. 506.

41. The constitution conferred upon the owners of slaves entire authority to seize and recapture them in any state in the Union, whenever they could do so without a breach of the peace or illegal violence. *Prigg v. Pennsylvania*, 16 Pet. 539.

42. The states have no power to legislate concerning the extradition of fugitive slaves, that power, under the last clause of section 2 of article 4 of the constitution, being exclusively in congress. [TANEY, C. J., and THOMPSON and WAYNE, JJ., dissenting.] *Ib.*

43. A state law which punishes for harboring a fugitive slave, or for preventing a lawful retaking by the lawful owner, is not in conflict with the constitution nor with the fugitive slave law of 1793. *Moore v. Illinois*, 14 How. 13.

**Carrier of Slaves — Liability.**

See CARRIER — PASSENGERS AND THEIR EFFECTS, 19.

**SLAVERY — continued.**

*Hirer of Slaves — Liability for their Escape.*  
See BAILMENT, 1.

*Right of Slave to Freedom under Ordinance of 1787, etc. — Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 118, 122, 123.

*Rights to Slaves — Bar of Statute of Limitations.*

See LIMITATIONS — STATUTES, 55 *et seq.*

*Title by Possession, when may be set up in another State.*

See CONFLICT OF LAWS, 13.

*Warranty "Slave for Life" not broken by Emancipation.*

See SALE — WARRANTY, 7.

**SOLD — Meaning of the Word.**

See INTERNAL REVENUE — ASSESSMENT AND COLLECTION, 3.

**SOVEREIGNTY — Change by Conquest — Effect on Rights to Property.**

See WAR, 13 *et seq.*

*Change does not affect Rights in the Soil, etc.*

See DISTRICT OF COLUMBIA, 7; INTERNATIONAL LAW, 18.

*Change — Effect on Rights in Property.*

See TREATY, 2, 6.

*Eminent Domain — Power to destroy the Use of Public Quays.*

See NEW ORLEANS.

*Existence of Sovereignty, etc. — Political Questions.*

See FEDERAL COURTS — JURISDICTION, 21 *et seq.*

*Federal Government — Powers, etc. — In general.*

See UNITED STATES — IN GENERAL.

*In general.*

See INTERNATIONAL LAW; STATES; UNITED STATES.

*Notes a Legal Tender, etc. — Power to make.*

See TENDER, 13.

*Rebellion — Power of Sovereign in Case of.*

See REBELLION.

*Seizure on High Seas for Breach of Municipal Regulation — Want of Power.*

See INTERNATIONAL LAW, 3, 4.

*State Sovereignty.*

See STATES — UNION, 6.

**SPAIN — Treaties — In general.**

See TREATY.

**SPANISH GRANTS — Public Lands — Lands in Louisiana, etc. — In general.**

See LANDS OF UNITED STATES — CONFLICTING CLAIMS; LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS.

**SPECIAL BAIL** — *In general.*  
See BAIL, 6-10.

**SPECIAL VERDICT** — *In general.*  
See TRIAL — TRIAL BY JURY, 93, 99.

**SPECIFIC PERFORMANCE** — *When compelled — General Rules — Time of the Essence of the Contract — Part Performance — Laches — Particular Cases.*  
See pl. 1-46.  
*Parties — Practice — Decree.*  
See pl. 47-72.

1. — *When compelled — General Rules — Time of the Essence of the Contract — Part Performance — Laches — Particular Cases.* Equity will not compel specific performance unless the vendor can make a good title to all the land contracted to be sold, or unless the case be proper for compensation. *Hepburn v. Auld*, 5 Cranch, 262; *Watts v. Waddle*, 6 Pet. 339.

2. Specific performance may be compelled if the vendor can give a good title at the time of the decree, although he had not a good title at the time when, by the contract, the land ought to have been conveyed. *Hepburn v. Auld*, 5 Cranch, 262; *Hepburn v. Dunlop*, 1 Wheat. 179.

3. Equity will not relieve where the complainant is in fault, and where it is impossible to reinstate the parties. *Pratt v. Carroll*, 8 Cranch, 471.

4. He who asks for a specific performance must be in a condition to perform himself. *Morgan v. Morgan*, 2 Wheat. 290.

5. In general, mere excess of price over value will not prevent specific performance. *Cathcart v. Robinson*, 5 Pet. 264.

6. Either party may have a specific performance, if he appear to have performed in good faith, and in proper time. *Watts v. Waddle*, 6 Pet. 339.

7. Equity will not lend its aid to enforce a contract in favor of those who have obtained it by fraud. *Kitchen v. Rayburn*, 19 Wal. 254.

8. If the terms of the contract be not so precise that neither party can reasonably misunderstand them, specific performance will not be decreed. *Colson v. Thompson*, 2 Wheat. 336.

9. So if the contract be vague or uncertain, or the evidence to establish it be insufficient, the parties will be left to their legal remedy. *Ib.* And see *Lee v. Dodge*, 5 Wal. 808.

10. If it be at all doubtful whether a negotiation resulted in a concluded agreement, specific performance will not be decreed. *Carr v. Duval*, 14 Pet. 77. And see *Lee v. Dodge*, 5 Wal. 808.

11. Nor where the land to be conveyed cannot be identified. *Preston v. Preston*, 95 U. S. 200.

12. Change in the value of the property contracted for between the date of the contract and the time when its execution is demanded will not prevent a specific performance, where the contract, when made, was fair and the circumstances were unobjectionable. *Willard v. Tayloe*, 8 Wal. 557.

**SPECIFIC PERFORMANCE** — *continued.*

13. The plaintiff must prove that he has performed, or offered to perform, on his part, the acts which constituted the consideration of the defendant's promise. *Colson v. Thompson*, 2 Wheat. 336; *Dorsey v. Packwood*, 12 How. 126; *Boone v. Missouri Iron Co.*, 17 How. 340.

14. Specific performance of an agreement to convey in consideration of payments to be made out of the profits of the land will not be enforced, there being a want of mutuality. *Dorsey v. Packwood*, 12 How. 126.

15. Although, in general, courts of equity will enforce specific performance where the contract is plain and was executed under circumstances free from objection, still, such relief is not matter of absolute right, but rests in a discretion to be exercised on consideration of all circumstances. *King v. Hamilton*, 4 Pet. 311; *Willard v. Tayloe*, 8 Wal. 557.

16. Although parties may sometimes be remitted to a court of law in case of a contract for specific property where the contract has become incapable of performance, it is otherwise where the remedy at law is not as complete and effectual as equity may give. *May v. Le Claire*, 11 Wal. 217.

17. In equity, time may be dispensed with, if not of the essence of the contract. *Hepburn v. Auld*, 5 Cranch, 262.

18. Time, considered as of the essence of the contract. *Secombe v. Steele*, 20 How. 94.

19. Failure to perform on the appointed day will not, of itself, deprive the party failing of his right to a specific performance, if he remain able to perform on his part. *Brashier v. Gratz*, 6 Wheat. 528.

20. But if circumstances be so changed that he cannot be put in the same situation that he would have been in had the contract been duly performed, the parties will be left to their remedy at law. *Ib.*

21. Where the vendor was to convey and take a mortgage on the land for part of the purchase-money, and he failed to convey, it was held that he should be treated as a mortgagee so far as the effect of lapse of time was concerned, and that he could not avoid the contract because the purchaser did not pay on the day. *Taylor v. Longworth*, 14 Pet. 172.

22. Where time is not of the essence of the contract, equity will give specific performance, although the time has expired, if there have been no laches. *Ib.*

23. Where it plainly appears that time was a material consideration, and that it was intended that the rights thereunder should depend on punctual performance, equity will not make a different rule for the parties. Thus, if on a sale of land on credit it be provided that on a failure to pay promptly the vendor may rescind and sue for rent, equity will not relieve the purchaser from the effect of a failure so to perform. *Stinson v. Dousman*, 20 How. 461.

**SPECIFIC PERFORMANCE — continued.**

24. Where a purchaser made partial payments, entered into possession, and made improvements, he was held entitled to a specific performance, although the full sum was not paid within the time prescribed, there being nothing to show that time was of the essence of the contract. *Ahl v. Johnson*, 20 How. 511.

25. Where one who has agreed to purchase declines to pay on the day agreed on, saying only that he is not prepared to do so, he will be deemed to have waived any objection to the sufficiency of the covenants in the conveyance tendered; and where he has been and is in possession, he will be deemed to have waived also any objection on the score of deferment of a tender of conveyance until after the day on which notes to have been given for the purchase-money at the time agreed on for conveyance would have matured. *Gregg v. Von Phul*, 1 Wal. 274.

26. Specific performance of an agreement for an exchange of lands enforced. *McIver v. Kyger*, 3 Wheat. 53.

27. One who claims under a lost unacknowledged deed may have a decree for specific performance against the original vendor and subsequent purchasers with notice. *Findlay v. Hinde*, 1 Pet. 241.

28. Where the purchaser entered into the contract of sale in the belief that he could relieve himself from performance by paying a certain penalty, and the vendor knowing of that belief assented to a reduction of the penalty on the purchaser's suggestion, to enable the purchaser to relieve himself from the contract on forfeiture of a less sum, it was held, on a bill by the vendor for specific performance, that the vendor could not have the aid of the court for that purpose if the purchaser would pay the penalty. *Cathcart v. Robinson*, 5 Pet. 264.

29. In a suit for title, it appeared that the plaintiffs purchased in good faith from one who had no title, but whose grantor afterwards bargained with the defendant, the true owner, for a confirmation of the first sale on payment of a certain sum. It was held that there was a privity of contract between the plaintiffs and the defendant, but that the plaintiffs must pay that sum before they could compel the defendant to make a title; that the plaintiffs were not liable for interest accrued before they received notice of the obligation to pay that sum; that they were not guilty of laches for not coming into equity while in possession in good faith; and that they were not bound to tender that sum before filing their bill. *Buchannon v. Upshaw*, 1 How. 56.

30. Where one is entitled to a specific performance on payment of a certain sum, and there is uncertainty as to the kind of money, whether paper or coin, in which it should be paid, a bill may be filed submitting that question to the court. *Willard v. Tayloe*, 8 Wal. 557.

31. Equity will enforce specific performance

**SPECIFIC PERFORMANCE — continued.**

of an agreement to give to one who is about to marry the promisor's son, an improvident person, a lot of ground on which the promisee agrees to build a house for herself and her family, with her separate funds, possession having been given and the house built. *Neale v. Neale*, 9 Wal. 1.

32. *Semble* that specific performance will not be denied of a contract contemplating a continuous perpetual performance, or a performance extending over an indefinite period, where the contract was fair when made, merely because by change of circumstances it has become less beneficial to one of the parties. *Rutland Marble Co. v. Ripley*, 10 Wal. 339.

33. A specific performance will not be enforced in favor of a grantor who has disregarded his own reciprocal obligations, as where he has unlawfully and fraudulently re-entered; nor where the duties of the grantee are continuous and involve the exercise of labor, skill, and cultivated judgment, as where he is annually to deliver out of quarries in the land a certain quantity of marble of specified kinds in blocks, the accordance of which with the contract the court for that reason cannot determine; nor where there is a want of mutuality, as where the grantor may abandon the contract on giving certain notice; nor where the grantor has a complete remedy by an action at law on his contract or by a re-entry under a right reserved in his deed. *Id.*

34. A purchaser of land cannot enforce specific performance of a contract to convey, if he has permitted the vendor to convey in trust to secure his own indebtedness, with a power to sell. Such acquiescence is a waiver of the right to a conveyance, or, at least, a subordination of the right to the interest of those for whose benefit the trust deed was given. *Preston v. Preston*, 95 U. S. 200.

35. Where an express company lent to a railroad company a large sum to repair and equip its road, the railroad company stipulating to furnish facilities for the transaction of the express business of the lender, compensation therefor to be credited on the loan until payment should be made, and the railroad company afterwards conveyed its property in trust to secure a debt, and the creditor, in a foreclosure suit, procured the appointment of a receiver, it was held that a decree for specific performance of the contract would not be decreed against the receiver, for the reason that, were a decree made, a payment of the loan would make the decree a nullity, and for the further reason, that a specific performance would be a form of satisfaction or payment which the receiver would not be required to make. *Southern Express Co. v. Western North Carolina Railroad Co.*, 99 U. S. 191.

36. Where parties settle their differences, the creditor releasing liens, etc., and the debtor making payments and agreeing to obtain partition of land in which he has an undivided interest, and to convey the part set off to him at a price to be



**SPECIFIC PERFORMANCE — continued.**

agreed on by arbitrators to be appointed by both, and the debtor dies without the partition having been had, equity will not refuse to enforce specific performance of the agreement because of the provision for arbitration concerning the price. *Guntton v. Carroll*, 101 U. S. 426.

37. Part performance, in some circumstances, will induce the court to give relief. *Brashier v. Gratz*, 6 Wheat. 528.

38. But not where much time has elapsed, where the complainant has failed to perform, where there has been a great change in the title and value of the land, and where the complainant could not have been compelled to perform. *Ib.*

39. When part performance will take a contract for an exchange of lands out of the statute of frauds. *Caldwell v. Carrington*, 9 Pet. 86.

40. To take a contract for the exchange of lands out of the statute of frauds, the plaintiff must make full and indubitable proof of the contract, of payment or tender of consideration, of a part performance such that a rescission would be a fraud on the other party, and of delivery of possession pursuant to the contract. *Purcell v. Miner*, 4 Wal. 513. And see *Williams v. Morris*, 95 U. S. 444.

41. Where A. agrees to exchange his land for B.'s land and a sum of money, and A. performs, and B. performs in part, A. may have a decree for specific performance, whether the memorandum of agreement is sufficient to satisfy the statute of frauds or not. *Bigelow v. Armes*, 108 U. S. 10.

42. Part performance by the vendee and acquiescence by the vendor will prevent the latter from putting an end to the contract at his mere will. *Taylor v. Longworth*, 14 Pet. 172.

43. The statute of frauds cannot be set up as a defence to an action to compel performance of a formal item of an agreement, where the contract has been fully performed by the plaintiff, and also by the defendant except as to such item. *Swain v. Seamens*, 9 Wal. 254.

44. A purchaser of land cannot enforce specific performance of the contract to convey where he has been guilty of laches in bringing his suit, and delay for a period which would bar an action at law for the property would amount to laches except under special circumstances. *Preston v. Preston*, 95 U. S. 200.

45. Specific performance will not be decreed after seven years, although the complainant have expended a large sum in part performance, although the first default were on the part of the defendant, and although that default probably prevented completion of performance on the part of the complainant, circumstances having so changed that neither party could derive from performance the benefits originally expected. *Pratt v. Carroll*, 8 Cranch, 471.

46. Specific performance will not be decreed, if there have been delay amounting to laches on the part of the plaintiff, especially if the value of

**SPECIFIC PERFORMANCE — continued.**

the property have changed and new interests have intervened, although time be not of the essence of the contract. *Holt v. Rogers*, 8 Pet. 420.

47. — *Parties — Practice — Decree.*] All the co-heirs of the deceased vendor are necessary parties to a suit by the purchaser for specific performance, or indemnity in lieu thereof. *Morgan v. Morgan*, 2 Wheat. 290.

48. To a bill for specific performance of a contract to convey land the vendor is a necessary party, although he have parted with all title to persons who are made parties. *Findlay v. Hinde*, 1 Pet. 241.

49. Whether a sub-purchaser of a part of the land from the vendee be a necessary party to a bill by the vendee for specific performance or not, the vendor cannot object to his joinder, if it will not affect his rights. *Taylor v. Longworth*, 14 Pet. 172.

50. A decree for specific performance carries the title as against judgment creditors of the defendant who became such *pendente lite*. *Secombe v. Steele*, 20 How. 94.

51. Any right such creditors may have to money paid into court by the complainant should be asserted in that court at that time, and not subsequently by adversary proceedings at law. *Ib.*

52. In general, the parties to the contract are the only proper parties to a suit for specific performance. Hence, to a bill filed by the promisee alone, the promisor cannot object, in the absence of special circumstances, on the ground of the non-joinder of one to whom the promisee has assigned a partial interest. *Willard v. Taylor*, 8 Wal. 557.

53. Where a lessee under a lease with a covenant to convey in fee on payment of a certain sum dies intestate, and the lessor takes possession without right and receives rents, the heir may sue alone, there being no personal representative, for an account and a conveyance on payment of the balance of the stipulated sum. *Proul v. Roby*, 15 Wal. 471.

54. Where one having made a will devising land to another for life and over to the executor in trust to support a contingent remainder in fee, afterwards makes a contract to sell to another who enters and pays part of the purchase-money, the devisee of the life estate may maintain a bill against the purchaser and the executor, he having qualified, to enforce a specific performance. *Bissell v. Heyward*, 96 U. S. 580.

55. The defence of the statute of frauds to a bill for specific performance may be made at the hearing under an answer denying the agreement. *May v. Sloan*, 101 U. S. 231.

56. The court cannot decree a sale, on a bill for specific performance of a contract to convey, with a prayer for general relief, but only where the bill is drawn with a double aspect and alternative prayers. *Hobson v. McArthur*, 16 Pet. 182.

57. Where the bill prayed for specific per-

**SPECIFIC PERFORMANCE — continued.**

formance and for general relief, but made no special case for payment of a sum which the plaintiff was to receive on rescission, a decree for that sum was refused. *Holt v. Rogers*, 8 Pet. 420.

58. If specific performance be denied at suit of the vendor, a decree for an account of rents and profits may be made against the purchaser under a prayer for general relief, if the bill show the purchaser to have been in possession. *Watts v. Waddle*, 6 Pet. 389.

59. Specific performance may be decreed under a prayer for general relief, a proper case being made in the body of the bill. *Taylor v. Merchants' Fire Insurance Co.*, 9 How. 390.

60. Where a vendor has conveyed a part of the land included in a contract of sale, but is unable to convey the residue, a court of equity may decree repayment of a proportionate part of the purchase-money with interest. *Pratt v. Law*, 9 Cranch, 456.

61. If there is no adequate remedy at law, the vendor may be treated as trustee for whoever may buy at a sale ordered by the court for the benefit of the purchaser. *Hepburn v. Dunlop*, 1 Wheat. 179.

62. If the vendor be indebted to the purchaser, and the sale be made in order to discharge the debt, the vendor must pay interest from the time of liquidation until he make a good title, and account for rents and profits from that time until the contract be specifically performed. *Ib.*

63. Where a lease for ten years, made in 1854, gave the lessee the option to purchase at any time within the term, at a stated price, the court, in 1864, refused to decree a conveyance for United States notes, then at a discount, but for coin only, on the ground that the parties must have contemplated payment in the latter medium, and that therefore it would be inequitable to sanction payment otherwise. *Willard v. Tayloe*, 8 Wal. 557.

64. Where specific performance would work hardship if decreed unconditionally, but equity, if decreed on conditions, it will be decreed on conditions. *Ib.*

65. The court will not enforce specific performance to the letter, when by reason of mistake it would be inequitable to do so. *Mechanics' Bank v. Lynn*, 1 Pet. 376.

66. Thus, where a judgment creditor agreed with his debtor to resort for payment to a fund created by a deed of trust, and the deed contained a limitation of time within which parties could come in, of which the creditor had no knowledge, and the time had already expired, it was held that the debtor could not enjoin the judgment without first enabling the creditor to come in under the deed. *Ib.*

67. Where, under a contract for the sale of land, the purchaser was entitled to a large surplus, the existence of which was not known to

**SPECIFIC PERFORMANCE — continued.**

the parties when they entered into the contract, and the purchaser, by omitting to make his payments, lost his strict legal right to a specific performance, it was held that, in the circumstances, the court would decree a conveyance of such surplus only on payment of additional compensation. *King v. Hamilton*, 4 Pet. 311.

68. In Minnesota, the title of the defendant to a bill for specific performance may be transferred by force of the decree alone, without a formal conveyance. *Secombe v. Steele*, 20 How. 94.

69. If, for any cause, a contract cannot be enforced specifically, equity will order compensation in damages; as, for instance, where county officials cannot be made to deliver county bonds to one entitled to them, because of obstacles intervening since the contract for their delivery was made, damages, in a proper case, may be decreed against the county. *Mobile County v. Kimball*, 102 U. S. 691.

70. The plaintiff, at the instance of his wife's father, took possession of a messuage of which the latter was the owner, with the understanding that it should be conveyed to him or his wife, and on the faith of that understanding expended a large sum for improvements. It was held, the contract being too uncertain in its provisions to admit of a decree for specific performance, that the plaintiff had an equitable lien thereon for the sum expended, as against the creditors of the owner, who had died insolvent. *King v. Thompson*, 9 Pet. 204.

71. It was also held that there should be no deduction on account of rent for the time the plaintiff was in possession. *Ib.*

72. A tenant who had an equitable lien for improvements made in expectation of a conveyance, held, in the circumstances, to have no demand *in personam* against the estate of his alleged vendor, for an amount which a sale of the premises failed to bring. *King v. Thompson*, 13 Pet. 128.

**Agreement for Partition and Conveyance — Performance by Heirs.**

See EQUITY — LACHES AND LIMITATION, 26.

**Alienage of Purchaser — Ground for refusing.**

See VENDOR AND PURCHASER — IN GENERAL, 32.

**Compelling the Delivery of Written Instruments — Does not lie.**

See EQUITY — JURISDICTION, 46.

**Contract to evade Claims of Creditors — Not enforced.**

See CONTRACT — WHAT CONSTITUTES, 61, 62, 65.

**Contract in Fraud of Act of Congress — Federal Question.**

See ERROR TO STATE COURT — JURISDICTION, 129.

**SPECIFIC PERFORMANCE** — *continued.*

*Contract for Exchange of Lands — Statute of Frauds.*

See **FRAUDS, STATUTE OF**, 13.

*Dismissal because Vendor cannot make good Title bars a New Bill after Removal of the Cloud.*

See **JUDGMENT — CONCLUSIVENESS**, 83.

*Memorandum of Contract sufficient to sustain a Bill.*

See **FRAUDS, STATUTE OF**, 1.

*Parties to Bill.*

See **EQUITY — PARTIES**, 48.

*Purchaser in Trust cannot set up his own Fraud, etc.*

See **LANDS OF UNITED STATES — DISPOSAL**, 32.

*Rents and Profits allowed although not claimed, where Performance is denied.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 485.

**SPIRITUOUS LIQUOR** — *In general.*

See **INTOXICATING LIQUOR**.

**STAGE-COACH** — *Liability to Passenger injured.*

See **CARRIER — OF PASSENGERS AND THEIR EFFECTS**, 2-4.

**STATE** — *Meaning of Word.*] The meaning of the term "state," as used in the constitution, considered. *Texas v. White*, 7 Wal. 700.

**STATE ATTORNEY** — *Communications to — When privileged Communication.*

See **LIBEL AND SLANDER**, 6.

**STATE BONDS** — *Bonds exceeding the Constitutional Limit of the State Debt — Bonds issued in Aid of Construction of Railroads.*] A statute authorizing the issue of state bonds creating an absolute obligation is void as in conflict with a constitutional amendment prohibiting an increase of the state debt beyond a specified limit, although the bonds are to be issued in discharge of an obligation existing when the amendment was adopted, where such obligation is uncertain, and the bonds, added to previous valid indebtedness, exceed the limit. *Williams v. Louisiana*, 103 U. S. 637; *Durkee v. Liquidation Board*, Id. 646.

2. The Tennessee statute of February 11, 1852, authorizing the issue of state bonds to certain railroad companies, and giving the state a lien on the roads, etc., to enforce payment, did not create the lien for the benefit of those who should become holders of the bonds, but for the state, and the state, therefore, could accept payment or release the lien in other modes than those specified in that statute. *Stevens v. Memphis & Charleston Railroad Co.* [*Tennessee Bond Cases*], 114 U. S. 663.

**STATE BONDS** — *continued.*

3. Neither under this nor under subsequent statutes was the relation of principal debtor and creditor created as between the railroad companies and the bondholders, nor was the relation of the state to the bondholders at any time that of a surety. *Id.*

4. Where a state issues its bonds in aid of a railroad, and in exchange for the company's bonds, the state bonds being made payable to bearer and negotiable, and the company's bonds payable to the state and not negotiable, and the company and not the state disposes of the state bonds, although it may be clear that, as between the state and the company, the company is the principal debtor, and the state the guarantor, as to the public the case may be otherwise, and the company may be deemed the guarantor of the state bonds, so that, if they are void as against the state, they may be enforced against the company, and a lien given by statute to the state to secure the liability of the company may be enforced by *bona fide* holders of the bonds. *Florida Central Railroad Co. v. Schulte*, 103 U. S. 118.

*Decisions of State Courts that such Bonds are void — Followed by Federal Courts.*

See **FEDERAL COURTS — STATE LAWS, RULES OF DECISION**.

*Statute authorizing — Violation of State Constitution — Federal Question.*

See **ERROR TO STATE COURT — JURISDICTION**, 72.

*Statute for Bonds to refund Tax on Federal Securities — Refusal to issue — Federal Question.*

See **ERROR TO STATE COURT — JURISDICTION**, 86.

**STATE COURTS** — *Jurisdiction under Federal Statutes — Conclusiveness of their Judgments as to their own Jurisdiction — Bound by Certain Decisions of Supreme Court — District Courts of Louisiana — Supreme Court of Utah Territory.*] In general, the state courts, in the exercise of their ordinary jurisdiction, may take jurisdiction to enforce federal statutes, where exclusive jurisdiction for their enforcement has not been conferred, as it may be, on the federal courts. *Clafin v. Houseman*, 93 U. S. 130.

2. The state courts have no jurisdiction of questions of forfeiture for breach of laws of the United States. *Gelston v. Hoyt*, 3 Wheat. 246.

3. Nor to try, or give any effect to, an inchoate French or Spanish title. *Burgess v. Gray*, 16 How. 48.

4. The state courts have jurisdiction of an action against a postmaster for detaining a newspaper for unlawful postage. *Teal v. Felton*, 12 How. 234.

5. The judgment of a state court of last resort is conclusive as to its own jurisdiction and the jurisdiction of the courts to which its

**STATE COURTS**—*continued.*

appellate power extends. *Davis v. Packard*, 8 Pet. 312.

6. The state courts are bound to conform to a decision of the supreme court declaring a state law to be in conflict with the federal constitution. *Cook v. Moffat*, 5 How. 295.

7. The district courts of Louisiana, as courts of general civil jurisdiction, may entertain a petition charging maladministration of a succession, which has been presented to a probate court, and transferred thence by consent. *Fourniquet v. Perkins*, 7 How. 160.

8. Where the supreme court of Utah reverses a judgment on appeal because the evidence does not sustain the findings, and all the evidence is before the court that could be considered below if the case were to be sent back, the court may state the facts proved and render the judgment which should have been rendered below, instead of remanding the case. *Stringfellow v. Cain*, 99 U. S. 610.

*Assignee in Bankruptcy may sue, etc., in, when.*

See BANKRUPTCY — JURISDICTION, 1-5.

*Bankruptcy—Voluntary Submission of Assignee to Jurisdiction—Effect.*

See BANKRUPTCY — PROCEEDINGS TO CONVERT ESTATE.

*Control of Records of the Courts of the Territory.*

See TERRITORIAL COURT, 13.

*Decisions, when followed by Federal Courts.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION.

*Erroneous Proceedings on Mandate reversible on Error.*

See APPEAL AND ERROR — JURISDICTION, 26, 30.

*Error to review Judgments—What Courts.*

See ERROR TO STATE COURT.

*Judgments have Credit, Validity, etc., in other States, etc.*

See JUDGMENT — CONCLUSIVENESS, 14 et seq.

*Jurisdiction ceases on Removal, when the Defendant is taken by Marshal on Habeas Corpus cum Causa.*

See REMOVAL OF CAUSES, 17.

*Jurisdiction in Particular Cases in the Admiralty.*

See ADMIRALTY — JURISDICTION, 17-21.

*Mandamus—Cannot issue to Federal Officer.*

See MANDAMUS, 1.

*Power of States to maintain Courts.*

See STATES — RIGHTS AND POWERS, 2.

*Power to issue Habeas Corpus to bring up Prisoner held under Federal Process—Other State Process.*

See HABEAS CORPUS, 38-41.

**STATE COURTS**—*continued.*

*Proceedings therein not to be enjoined by Federal Courts, except, etc.*

See INJUNCTION, 1, 2.

*Recovery under State Pilot Laws—Service tendered and refused out of State Jurisdiction.*

See PILOT, 6.

*Removal of Causes from State Courts to Federal—Practice—Jurisdiction after Removal.*

See REMOVAL OF CAUSES.

*Rule denying Privilege to Professional Communications does not bind Federal Court.*

See ATTORNEY, 44.

*Suits in State Courts not within the Seventh Amendment to the Constitution—Jury.*

See JURY, 46.

**STATE LAWS**—*Adding to Provisions of Act of Congress—When unconstitutional.*

See STATES — RIGHTS AND POWERS, 5.

*Questions of the Construction of, give no Ground of Jurisdiction in Error to State Court.*

See ERROR TO STATE COURT — JURISDICTION.

**STATE RECORDS**—*Attachment held to be overreached by Mortgage in another State—Denial of Faith and Credit—Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 93, 94.

*Conflicting Decisions of same State Court—Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 125.

*Credit to be given them—Faith and Credit—Probate of Will.*

See WILL, 25.

**STATES**—*Boundaries between States.*

See STATES — BOUNDARIES.

*Compacts between States—In general.*

See STATES — COMPACTS.

*Limitation against.*

See STATES — LIMITATION.

*Miscellaneous Matters.*

See STATES — IN GENERAL.

*Public Lands of States—In general.*

See LANDS OF STATES.

*Rights and Powers in general.*

See STATES — RIGHTS AND POWERS.

*Suits by and against States.*

See STATES — SUITS.

*Union of States.*

See STATES — UNION.

**STATES — BOUNDARIES —** *Boundaries between States — Bar by Lapse of Time.* The boundary of Kentucky under the act ceding to the United States all of her "territory northwest of the river Ohio," is low-water mark on the northwestern side of that river. Thus, it does not include a peninsula on that side separated from the mainland by a channel or bayou which contains water through its whole extent only when the river is above low-water mark. *Handly v. Anthony*, 5 Wheat. 374.

2. The boundary between Rhode Island and Massachusetts having been settled by a joint commission in 1711, and the acts of the commissioners having been then adopted by the two colonies, it was held too late to disturb the line so compromised by a bill filed in 1833, on an allegation of mistake not clearly made out. *Rhode Island v. Massachusetts*, 4 How. 591.

3. The boundary between Missouri and Iowa, determined. *Missouri v. Iowa*, 7 How. 660; *Missouri v. Iowa*, 10 How. 1.

4. When Georgia ceded to the United States the land west of a line running along the western bank of the Chattahoochee, she retained all the land east of that line, including the bed of the river; and the bed of the river, for the purposes of the boundary then fixed, must be deemed to extend beyond low-water mark. *Howard v. Ingersoll*, 13 How. 381.

5. The boundary between Georgia and Alabama, as determined by the construction of the cession by Georgia to the United States of the land west of a line beginning at a certain point on the western bank of the Chattahoochee, and "running up said river and along the western bank thereof," is not low-water mark, but the western bank, so that Georgia has jurisdiction over the bed of the river including the soil which is alternately covered and left bare by the fluctuation of the water at an ordinary or mean stage, without regard to the freshets of winter or spring, or the droughts of summer or autumn. *Alabama v. Georgia*, 23 How. 505.

6. On a bill to determine whether, on a settlement of the boundary between Missouri and Kentucky, Wolf Island in the Mississippi River was in the former or in the latter state (the middle of the main channel as it was in 1820, when Missouri was admitted into the Union, or prior thereto, being admitted to be the boundary), the court, considering the testimony of witnesses as to the exercise of jurisdiction over the island and as to the location of the main channel when the boundary was fixed, the natural changes wrought by the course of the current, the height of the island, and the character of its soil and trees, determined that the main channel was formerly on the west side of the island, and that therefore the island belonged to Kentucky. *Missouri v. Kentucky*, 11 Wal. 395.

7. The agreement of September 16, 1833, between New York and New Jersey in respect to boundary, and the act of June 28, 1834 (4

**STATES — BOUNDARIES — continued.**

Sts. 708), by which congress consented thereto, considered and construed. *Ex parte Devos Manufacturing Co.*, 103 U. S. 401.

8. Although lapse of time sufficient to constitute a bar at law under the statute of limitations will be, by analogy, a bar in equity as between persons, it will not have the same effect in a contest between states as to boundary, where all circumstances must be considered. *Rhode Island v. Massachusetts*, 15 Pet. 233.

*Compacts respecting Boundary.*

See **STATES — COMPACTS**, 4, 5.

*Mistake in fixing — Relief in Equity.*

See **EQUITY — JURISDICTION**, 93.

*Pleading and Practice in Suits to determine Boundary.*

See **STATES — SUITS**, 33 et seq.

*Question of Boundary — Federal Question not involved.*

See **ERROR TO STATE COURT — JURISDICTION**, 53.

**STATES — COMPACTS —** *Compacts between States — Consent of Congress — Restrictions by Compact on Legislative Power — Compacts to fix Boundaries — Particular Compacts.*

The consent of congress necessary under the constitution to give validity to a compact between states need be expressed in no particular form. Thus, where congress consented to the separation of Kentucky from Virginia and to its erection as a state, it virtually consented to the compact by which the separation was agreed upon. *Green v. Biddle*, 8 Wheat. 1.

2. And such consent need not be by way of express assent to every proposition thereof; it may be inferred from legislation on the subject, — consent, for instance, to the agreement between Virginia and West Virginia (founded on the ordinance of the Virginia organic convention under which West Virginia was organized, on the Virginia statute of May 13, 1862, and on the constitution of West Virginia), by which it was agreed that certain border counties should go with West Virginia on condition that the voters thereof should so vote, may be inferred from the act of December 31, 1862 (12 Sts. 633), admitting West Virginia to the Union with the boundary so far a matter of contingency. [CLIFFORD, FIELD, and DAVIS, JJ., dissenting from the application.] *Virginia v. West Virginia*, 11 Wal. 39.

3. A compact between states is not invalid because it restricts the exercise of their legislative power in certain particulars. *Id.*

4. The states still retain the sovereign right to fix boundaries between their respective jurisdictions by compact, although it can be exercised only by consent of congress. *Poole v. Fleegeer*, 11 Pet. 185.

5. Such boundaries so fixed are conclusive of the rights of the citizens of the states. *Id.*

**STATES — COMPACTS — continued.**

6. Where a state agrees that certain counties lying on its border shall go to a neighboring state whenever the voters of such counties so vote, and provides by statute that the governor shall certify to such other state the result of the voting, if in his opinion the result be favorable, and he so certify, and the second state take and exercise jurisdiction, the first state is bound, and cannot set aside the transaction in equity on the ground of the want of a fair vote and of misconduct of her own election officers whereby the governor was deceived. *Virginia v. West Virginia*, 11 Wal. 39.

7. The ordinance of the Virginia organic convention under which West Virginia was organized, and the Virginia statute of May 13, 1862, consenting to such organization, together with the constitution of West Virginia, constituted an agreement that certain border counties should be included in the latter state whenever the voters thereof should ratify such constitution. *Ib.*

8. The compact for the separation of Kentucky from Virginia provided for the preservation of titles, not for the tribunals by which they were to be tried. *Wilson v. Mason*, 1 Cranch, 45.

9. The provision in the compact for the appointment of commissioners to determine the meaning of the compact in case of dispute, contemplates disputes between the states only; and does not divest the courts of their ordinary jurisdiction over suits between individuals in which disputes concerning the effect of the compact may arise. *Green v. Biddle*, 8 Wheat. 1.

10. Article 7 of that compact did not preclude Kentucky from passing a reasonable statute of limitations. *Hawkins v. Barney*, 5 Pet. 457.

11. The compact settling the boundary between Virginia and Tennessee operated on titles, not on remedies. *Robinson v. Campbell*, 3 Wheat. 212.

12. The compact of 1820 between Kentucky and Tennessee admitted that the true boundary between those states was the parallel of 36° 30', and that Walker's line was to be deemed the true line only for the purposes of future jurisdiction. *Poole v. Fleeger*, 11 Pet. 185.

13. The act of congress incorporating the Alexandria Canal Company did not violate the compact of 1785 between Maryland and Virginia. *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91.

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**STATES — RIGHTS AND POWERS — In general**

— Power to declare Martial Law — To maintain Judicial Departments free from Federal Taxation — To appropriate the Beds of Tide-waters — To create Maritime Liens — Power as Owner of Shares in Corporations — Concurrent Power, etc.

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*Police Power — Power to Protect the Lives, Health, or Property of Citizens — To prohibit the Sale of Certain Things — To regulate Certain Industries.*

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*Powers of States in Rebellion — To make Laws — To alienate State Property — Power of State in Course of Reconstruction — Power to sue for State Property alienated during Rebellion.*

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1. — *In general — Power to declare Martial Law — To maintain Judicial Departments free from Federal Taxation — To appropriate the Beds of Tide-waters — To create Maritime Liens — Power as Owner of Shares in Corporations — Concurrent Power, etc.* A state government may declare martial law in order to protect itself from destruction by armed rebellion; and the legislature alone has power to determine upon the existence of the exigency. [WOODBURY, J., dissenting.] *Luther v. Borden*, 7 How. 1.

2. The sovereign power of the states to maintain judicial departments remained unaltered by the constitutional grant of power to the general government; and the general government, under its power to tax, cannot impose a tax on the salary of a judge of a state court (as, *e. g.*, by the acts taxing incomes), any more than a state can impose a tax on an instrument of the general government, such an officer being a means to the exercise by the state of such reserved power, and the state, as regards its reserved power, being as completely sovereign as the general government in respect to powers granted. [BRADLEY, J., dissenting.] *Collector v. Day*, 11 Wal. 113.

3. Subject to the paramount right of navigation, each state owns the beds of all tide-waters within its limits, and may, therefore, appropriate them to be used by its citizens as a common for the taking and cultivating of fish, if navigation be not thereby obstructed, as, *e. g.*, by a statute prohibiting the citizens of other states only from planting oysters therein; and such a statute is not void as a regulation of commerce, nor as violating any privilege or immunity of inter-state citizenship, such a right being a property right, and not a mere privilege. *McCready v. Virginia*, 94 U. S. 391.

4. The courts can afford no relief against the action of a state through amendment of its constitution precluding its executive officials from making to holders of state bonds from funds in the treasury payments guaranteed to them by a previous constitution and law, the abrogation of the requirements of which impairs the obligation of the contract of the state. Neither by injunction can such officials be restrained from paying out public moneys as required by the new constitution, nor by mandamus can they be compelled to make the payments required by the earlier law but prohibited by the later one. [FIELD and HARLAN, JJ., dissenting.] *Louisiana v. Jewel*, 107 U. S. 711.

5. A state law adding to the provisions of an act of congress on a subject over which congress

**STATES—RIGHTS AND POWERS—continued.**

has exclusive power is unconstitutional, as, for instance, the Pennsylvania statute of March 26, 1826, relating to the taking of slaves. *Prigg v. Pennsylvania*, 16 Pet. 539.

6. A state cannot create maritime liens, nor confer jurisdiction on a state court to enforce them by proceedings *in rem*, as practised in the admiralty. *The Belfast*, 7 Wal. 624.

7. If a state become the holder of all the stock in a banking corporation, it imparts to the corporation none of its attributes of sovereignty, and can, as a stockholder, exercise no power other than such as any other holder of stock to the same amount might exercise. [STORY, J., dissenting.] *Briscoe v. Kentucky State Bank*, 11 Pet. 257.

8. A state law which deprives the creditors of the corporation of the right to follow its effects, on its dissolution, into the hands of any one not a *bona fide* creditor or a purchaser without notice, and appropriates the property to other uses, is invalid as impairing the obligation of their contracts. *Curran v. Arkansas*, 15 How. 304.

9. Although the stock of the bank be owned wholly by the state, if the bank be insolvent, the state cannot appropriate its assets to pay debts of the state, as distinguished from debts of the bank. The assets are a trust fund first applicable to the payment of the debts of the bank, and a statute making such an appropriation impairs the obligation of such a contract, and is void. *Baring v. Dabney*, 19 Wal. 1.

10. *Semble*, that where congress has conferred on a railroad corporation chartered by a state a right of way over public lands in a territory, the state afterwards created out of the territory can prevent the enjoyment of the right conferred only to the extent to which it could refuse a recognition of its own previously granted right. *St. Joseph & Denver City Railroad Co. v. Baldwin*, 103 U. S. 426; *Van Wyck v. Knevals*, 106 U. S. 360.

11. A classification of the cases in which the states may exercise power concurrently with or independently of the federal government. *Gilman v. Philadelphia*, 3 Wal. 713.

12. — *Police Power — Power to protect the Lives, Health, or Property of Citizens — To prohibit the Sale of Certain Things — To regulate Certain Industries, etc.* The states, in the exercise of their police power, may prohibit, under a penalty, the sale of an article the sale of which would endanger the lives, health, or property of citizens, — the sale, for instance, of coal-oil, inflammable at less than a certain temperature; and the statute may be enforced against one who holds a patent for the manufacture of such an article. *Patterson v. Kentucky*, 97 U. S. 501.

13. Section 29 of the internal revenue act of March 2, 1867 (14 Sts. 484), making it a misdemeanor to sell certain highly inflammable illuminating oils, is a mere police regulation relating exclusively to the internal trade of the

**STATES — RIGHTS AND POWERS — continued.**

States, and not to be justified as an aid of the taxing power, and can have effect, therefore, only where the legislative power of congress is exclusive, as, *e. g.*, in the District of Columbia. *United States v. Dewitt*, 9 Wal. 41.

14. State laws which prohibit the sale of intoxicating liquor, imported as well as domestic, in quantities smaller than large quantities specified, without license from town or county authorities, are not repugnant to the clause in the constitution which empowers congress to regulate commerce. *Thurlow v. Massachusetts [License Cases]*, 5 How. 504.

15. The states have power to tax or prohibit the keeping and selling of such liquor, notwithstanding congress may have imposed a tax on the business by way of license. *Pervear v. Massachusetts*, 5 Wal. 475.

16. A statute granting to a corporation for a series of years the right to maintain slaughter-houses, landings for cattle and other animals, and yards for enclosing cattle and other animals intended for sale or slaughter, in a large city and several hundred square miles of adjacent territory, may be a valid exercise of the police power of the state, under the constitution, although it be exclusive of the right of any other person to maintain them, and require that all landing, yarding, and slaughtering be done there; all owners of animals having the right to land and yard, and all butchers having the right to slaughter there, the fees to be charged being properly limited, and the health and comfort of the public being properly considered in the location of the business and in the inspection of animals; and this, notwithstanding the thirteenth amendment, which forbids the creation of servitudes; and notwithstanding the fourteenth amendment, which forbids the abridgment of the privileges and immunities of citizens of the United States, the taking of liberty, property, etc., and the denial of the equal protection of the laws. [*CHASE, C. J., and SWAYNE, FIELD, and BRADLEY, JJ., dissenting, holding that such an act goes beyond what is necessary as matter of police regulation, creates an unwarranted monopoly, and violates that provision of the fourteenth amendment which protects the privileges and immunities of the citizen.*] *Butchers' Benevolent Association v. Crescent City Live-Stock Landing & Slaughter-House Co. [Slaughter-House Cases]*, 16 Wal. 36.

17. A statute, like the Missouri statute of January 23, 1872, prohibiting the driving or conveying of Texas, Mexican, or Indian cattle into the state, between March 1 and November 1 of each year, is not a mere quarantine law nor a proper inspection law, but an attempt to regulate commerce, and therefore unconstitutional, the states having, as part of the police power, no power to obstruct inter-state commerce, except where it is absolutely necessary to self-protection. *Hannibal & St. Joseph Railroad Co. v. Husen*, 95 U. S. 465.

**STATES — RIGHTS AND POWERS — continued.**

18. A state statute forbidding others than Indians from settling on an Indian reservation within the state, and authorizing a summary proceeding for their ejectment, is but a police regulation, and not repugnant to the constitution or to any federal law. *New York v. Dibble*, 21 How. 366.

19. — *Powers of States in Rebellion — To make Laws — To alienate State Property — Power of State in Course of Reconstruction — Power to sue for State Property alienated during Rebellion.* The constitutional disabilities and obligations of a state remain unaltered by rebellion, a state so engaged being still in the Union. *Gunn v. Barry*, 15 Wal. 610.

20. Acts of the states in rebellion not impairing or tending to impair the supremacy of the national authority or the rights of citizens under the constitution are, in general, to be treated as valid. *Williams v. Bruffy*, 96 U. S. 176; *Stevens v. Griffith*, 111 U. S. 48.

21. *Semble*, that acts necessary to peace and order among citizens, *e. g.*, acts sanctioning and protecting marriage and the domestic relations, governing descents, regulating conveyances, and providing remedies for injuries to person or property, are the only acts of a *de facto* rebel state government, which the general government can ever regard as valid. *Texas v. White*, 7 Wal. 700. See *Huntington v. Texas*, 16 Wal. 402; *Horn v. Lockhart*, 17 Wal. 570.

22. A statute of one of the confederate states, enacted merely in aid of the rebellion, cannot be enforced. *Thomas v. Richmond*, 12 Wal. 349.

23. Public property of a state, *e. g.*, government bonds, alienated during rebellion by the usurping state government, for the purpose of carrying on the war against the general government, may be reclaimed for the state by a restored state government organized in allegiance to the Union; alienation in such case being inoperative. *Texas v. White*, 7 Wal. 700.

24. But otherwise where the alienation is for a purpose laudable and proper. *Huntington v. Texas*, 16 Wal. 402.

25. Where the property consists of such bonds, no one other than a holder of the bonds, or one who, having held them, has received the proceeds with notice, can be held liable to the claim of the reconstructed state. *Id.*

26. The adoption of a constitution by a rebel state, in course of reconstruction after the war, was not the less a voluntary act, nor is the constitution the less a law of the state which the state is estopped to deny, because the adoption was one of the conditions on which the state was restored to its normal relations to the Union, with representation in congress, etc. *White v. Hart*, 13 Wal. 646.

27. Texas, while governed provisionally under the reconstruction acts of March 2 and 23, and July 19, 1867 (14 Sts. 428; 15 Sts. 2, 14), dividing certain of the Southern states into mili-



**STATES — RIGHTS AND POWERS — continued.**

tary districts, and providing for the assignment of army officers thereto for certain of the purposes of government, was a state competent to sue for state property disposed of by the usurping rebel state government, the government and the people of the state then being restored to peaceful relations with the United States. [GRIER, SWAYNE, and MILLER, JJ., dissenting.] *Texas v. White*, 7 Wal. 700.

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*Pleading and Practice, in general — Process, when served, and on whom — Non-appearance.*

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1. — *Suits by and against States — Jurisdiction as depending on Parties — Suits against a State — State as a Party — Suits against State Officers, etc.* Under the constitution, as originally adopted, a state could be sued by a citizen of another state. [BREDELL, J., dissenting.] *Chisholm v. Georgia*, 2 Dal. 419.

2. But since the adoption of the eleventh amendment, restraining the exercise of the judicial power in certain cases, the rule is otherwise; and it makes no difference whether the citizen is the nominal as well as the real plaintiff, or whether the suit is brought by the state for his benefit on an assignment taken pursuant to statute for that purpose. *New Hampshire v. Louisiana*, 108 U. S. 76.

3. The principle of international law which permits a state imperatively to demand of another state the payment of debts due its citizens, has no application to such a case, the states of the Union having surrendered that attribute of sovereignty. *Ib.*

4. Nor can a right in the state to sue for its citizens be inferred to result from such surrender, as originally, the citizen having had a right to sue for himself, it cannot be supposed that the state was also intended to have a right to sue in his behalf. *Ib.*

5. Suits against states by citizens of other states, pending at the time of the adoption of the eleventh amendment, could be no further prosecuted after such adoption. *Hollingsworth v. Virginia*, 3 Dal. 378.

6. The prohibition in the eleventh amendment, of suits by individuals against states, does not extend to a case in which a state is not a party of record, although the state have entire ultimate interest in the subject of the suit. *Osborn v. United States Bank*, 9 Wheat. 738; *Davis v. Gray*, 16 Wal. 203.

7. As, for instance, to a suit against the auditor and treasurer of a state, to enjoin them from

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paying away money taken from the plaintiff by way of collecting a tax under a statute invalid under the constitution, and to compel them to restore the same. *Osborn v. United States Bank*, 9 Wheat. 738.

8. Or to a suit to enjoin the governor and the commissioner of the land office of a state by which a grant of land to a railroad company, in aid of the construction of the road, has unlawfully been declared forfeited, from granting the land to settlers. [See CHASE, C. J., and DAVIS, J., dissenting.] *Davis v. Gray*, 16 Wal. 203. But see *Cunningham v. Macon & Brunswick Railroad Co.*, 109 U. S. 453.

9. When the governor of a state is sued, not by name, but by his style of office, and the claim is made upon him solely by reason of his official character, the state is to be deemed the real party of record. *Governor of Georgia v. Madrazo*, 1 Pet. 110.

10. The federal courts have jurisdiction of a suit against a bank the charter of which provides that the president and directors shall be the real body corporate, although a state be sole owner of the stock. *Kentucky Bank v. Wister*, 2 Pet. 318.

11. Where a state indorses bonds of a railroad company, taking a lien on its property for security, and on default in payment causes the property to be sold by a receiver, and itself becomes the purchaser, and issues its own bonds in lieu of the bonds so indorsed, a holder of additional bonds, issued before such default, and also indorsed by the state, cannot maintain a bill to which the governor and state treasurer are parties defendant, to foreclose his mortgage, to set aside the sale, and to establish a prior or equal lien, the defendants demurring on the ground that the state is the party in interest. The state is an indispensable, if not the only proper, party defendant. [FIELD and HARLAN, JJ., dissenting, holding that the mere assertion by the defendants of title in the state should not preclude inquiry into the rightfulness of its possession or the validity of its title, and that if its title is invalid, it is not a party, and the court has jurisdiction.] *Cunningham v. Macon & Brunswick Railroad Co.*, 109 U. S. 446.

12. If a state agree to receive her coupons for taxes, and by a subsequent statute refuse to do so, thus impairing the obligation of her contract, and an officer whose duty, under the later law, it is to collect state taxes in cash refuse to accept coupons, and levy on chattels for the taxes due, the owner of the chattels so levied on, whose tender has been refused, may maintain an action against the officer. [WAITE, C. J., and MILLER, BRADLEY, and GRAY, JJ., dissenting, on the ground that such an action is in effect an action against the state.] *Pointexter v. Greenhow*, 114 U. S. 270; *White v. Greenhow*, Id. 307; *Chaffin v. Greenhow*, Id. 309 [Virginia Coupon Cases].

STATES — SUITS — *continued.*

13. The form of the action may be trespass, although the unconstitutional legislation prohibits the action. [WAITE, C. J., and MILLER, BRADLEY, and GRAY, JJ., dissenting.] *Chaffin v. Taylor* [Virginia Coupon Cases], 114 U. S. 307.

14. An injunction will issue to restrain a levy on rolling-stock of a railroad corporation which has tendered such coupons in payment of taxes due. [WAITE, C. J., and MILLER, BRADLEY, and GRAY, JJ., dissenting.] *Allen v. Baltimore & Ohio Railroad Co.* [Virginia Coupon Cases], 114 U. S. 311.

15. Where lands granted to a state for purposes of internal improvement are by statute constituted a fund for such purposes, and, with the proceeds, vested in certain state officers in trust, and they, pursuant to their powers, pledge the fund for the payment of the interest on railroad bonds issued in aid of construction, the road to pay the interest and to pay a certain percentage of the principal for a sinking fund, and the bonds to constitute a lien on the road, the state, not the board of trustees, is the real party in interest, and may therefore maintain an original bill in equity in the supreme court to set aside a sale of the road at suit of bondholders, etc., and to compel a resort, on maturity of the bonds, to the fund as a primary fund for payment of both principal and interest. *Florida v. Anderson*, 91 U. S. 667.

16. And it will not be precluded therefrom by the fact that the trustees must be joined as formal parties plaintiff, it being apparent that the trustees are mere agents of the state. *Ib.*

17. Where it clearly appears that joinder of a state is necessary to a grant of the relief sought, the court will not take jurisdiction, the state not being joined. *Cunningham v. Macon & Brunswick Railroad Co.*, 109 U. S. 446.

18. The fact that a state has an interest in the subject-matter of a suit between individuals, which it may choose to assert, does not oust the federal courts of jurisdiction; but on suggestion of such an interest as would make the state a necessary party, the suggestion must be examined, and its correctness determined by the court. Thus, it being suggested in the supreme court that a state was the owner of a fund proceeded against in the district court, in admiralty, the court examined the state's claim, and having found that the state was not a necessary party, issued a peremptory mandamus directing the district judge to proceed to adjudicate between the individual parties. *United States v. Peters*, 5 Cranch, 115.

19. Where a suit was brought to restrain a state treasurer from collecting a certificate that had been deposited with him for the benefit of the state and the treasurer demurred for that the state was the real party in interest, and the state then came in and claimed the money, which in the mean time had been paid into

STATES — SUITS — *continued.*

court, it was held that the state, by so appearing and presenting and prosecuting a claim to the fund, submitted to the jurisdiction and became a party so far as necessary for the complete determination of the litigation. *Clark v. Barnard*, 108 U. S. 436.

20. In order to the exercise by a state of a right to sue in the supreme court, there must be a state government competent to represent the state in its relations with the national government, so far, at least, as the institution and prosecution of a suit are concerned. *Texas v. White*, 7 Wal. 700.

21. — *Pleading and Practice, in general — Process, when served, and on whom — Non-appearance.*] *Quære*, whether a state suing to enjoin a nuisance in a navigable river on her borders must not aver some special injury, such as a private person would have to show to maintain a similar action. *South Carolina v. Georgia*, 93 U. S. 4.

22. A subpoena in equity to a state must be served sixty days before the return-day, and in default of appearance on that day the plaintiff may proceed *ex parte*. *Grayson v. Virginia*, 3 Dal. 320.

23. Where it is not so served, a new subpoena may be awarded, returnable to the next term. *New Jersey v. New York*, 3 Pet. 461.

24. Service of process on the governor and attorney-general of a state is sufficient service on the state. *Chisholm v. Georgia*, 2 Dal. 419.

25. Process against a state must be served on its chief executive magistrate and its attorney-general. *Grayson v. Virginia*, 3 Dal. 320; *New Jersey v. New York*, 5 Pet. 284.

26. Leaving a copy of the subpoena at the house of the governor is a sufficient service on him. *Huger v. South Carolina*, 3 Dal. 339.

27. Where a rule issues from the supreme court in the exercise of its original jurisdiction against a state, it should be served on the governor and attorney-general. *Kentucky v. Dennison*, 24 How. 66.

28. But if judgment be recovered by the treasurer of a state suing *ex officio*, the citation should be served on him, notwithstanding a rule of court requiring process to be served on the governor or attorney-general where a state is the party. The citation should be served on the party of record. *Poydras de la Lande v. Louisiana Treasurer*, 17 How. 1.

29. In a suit against a state, if the defendant do not appear after due service of process, the plaintiff may have a rule for proceeding to a hearing *ex parte*. *New Jersey v. New York*, 5 Pet. 284; *Rhode Island v. Massachusetts*, 12 Pet. 657 [BALDWIN, J., dissenting].

30. So, if appearance is withdrawn on leave. [BALDWIN, J., dissenting.] *Rhode Island v. Massachusetts*, 12 Pet. 657.

31. Proclamation was made in an action against the state of New York, "that any per-

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son having authority to appear" for the state should "appear accordingly," and, no one appearing, it was ordered on motion of the plaintiff that unless the state should appear or show cause by the first day of the next term, judgment by default would be entered. *Oswald v. New York*, 2 Dal. 415.

32. A state having been duly served with process, and not appearing, the court, at the term next after the return term, ordered that if an appearance were not entered or cause shown by the first day of the next term, judgment by default should be given against the state. [IREDELL, J., dissenting.] *Chisholm v. Georgia*, 2 Dal. 419.

33. — *Pleading and Practice — In Suits concerning Boundary.* In a suit between states to determine a question of boundary, the proper mode of pleading is by bill and cross-bill, so that there may be a decree establishing the true line. *Missouri v. Iowa*, 7 How. 660.

34. In such case, the rules as to time of answering, etc., governing in suits between persons, should not be applied. *Rhode Island v. Massachusetts*, 13 Pet. 23.

35. Although the pleading and practice in such cases should be according to the rules in chancery, yet those rules should be so moulded and applied as to bring the cause to a hearing on its merits. *Rhode Island v. Massachusetts*, 14 Pet. 210; *Florida v. Georgia*, 17 How. 478.

36. Thus, where a decision on the plea might have had the effect to keep out of view some part of the merits of the complainant's case, the court refused to decide the cause on the plea. *Rhode Island v. Massachusetts*, 14 Pet. 210.

37. In a suit between two states to settle a question of boundary, where the United States had an interest as a proprietor and grantor of lands in the disputed territory, the attorney-general, on filing an information, had leave to adduce evidence, written or parol, and to examine witnesses and file their depositions, in order to establish the boundary claimed by the United States. [McLEAN, DANIEL CURTIS, and CAMPBELL, JJ., dissenting.] *Florida v. Georgia*, 17 How. 478.

*Not a Party to Ejectment merely because the Land was granted by it — Nor because the Land is within its Limits.*

See EJECTMENT — PLEADING AND PRACTICE, 4, 5.

*Supreme Court Jurisdiction of Suits to which State is Party, not necessarily exclusive — Removal.*

See REMOVAL OF CAUSES, 3.

*Supreme Court Jurisdiction — Boundary — Nuisance.*

See SUPREME COURT — JURISDICTION, 3 et seq.

**STATES — UNION — Union Indestructible — Ordinance of Secession a Nullity — When the States became entitled to Sovereign Rights over**

**STATES — UNION — continued.**

*Internal Affairs.*] The union of the states was designed to be perpetual, and is indestructible by the act of any one or any number less than the whole of them. *Texas v. White*, 7 Wal. 700. And see *Gunn v. Barry*, 15 Wal. 610.

2. The union between Texas and the other states was as complete in those respects when she came in as a state, as that between the original states. *Id.*

3. Such perpetuity and indissolubility do not imply a loss by the state of a distinct individual existence, or of the right of self-government, the constitution looking to an indestructible union of indestructible states. *Id.*

4. Hence, the ordinance of secession passed by that state in February, 1861, and all acts of the people and of the legislature in ratification thereof, were absolutely void and without effect on the obligations of the state as a member of the Union. *Id.*

5. The Louisiana ordinance of secession of 1861 was a nullity, and did not affect the jurisdiction of the supreme court of the state, nor its relation to the appellate power of the supreme court of the United States. *White v. Cannon*, 6 Wal. 443.

6. On July 4, 1776, the several states of the Union became entitled to all the rights and powers of sovereign states over their internal regulations; and among those rights was the right to the allegiance of their citizens. *McIlvaine v. Cox*, 4 Cranch, 209.

**STATUTE — Constitutionality in general.**

See STATUTE — CONSTITUTIONALITY.

*Construction of Statutes in general.*

See STATUTE — CONSTRUCTION.

*Enactment of Statutes.*

See STATUTE — ENACTMENT.

*Miscellaneous Matters.*

See STATUTE — IN GENERAL.

*Particular Statutes.*

See STATUTE — PARTICULAR STATUTES.

*Repeal of Statutes, in general.*

See STATUTE — REPEAL.

**STATUTE — CONSTITUTIONALITY — In general**

— *Effect of unconstitutionality.*

See pl. 1-7.

*Constitutionality as affected by Mention of Subject-matter in Title.*

See pl. 8-15.

1. — *In general — Effect of unconstitutionality.*] An act of congress repugnant to the constitution is not law. *Marbury v. Madison*, 1 Cranch, 137.

2. The courts will not declare a law unconstitutional unless its incompatibility with the constitution be clear. *Fletcher v. Peck*, 6 Cranch, 87; *Dartmouth College v. Woodward*, 4 Wheat. 518.

**STATUTE — CONSTITUTIONALITY — continued.**

3. An act of congress clearly pursuant to authority conferred by the constitution is the supreme law of the land, and a state statute in conflict therewith is void. *Sinnot v. Davenport*, 22 How. 227.

4. Statutes unconstitutional in part only may be upheld so far as they are constitutional, if the constitutional part may be severed from the other. *Packet Company v. Keukuk*, 95 U. S. 80.

5. A statute authorizing a school district to issue bonds, etc., conflicts with a constitutional prohibition against the passage of special acts conferring corporate powers. *School District v. St. Joseph Fire & Marine Insurance Co.*, 103 U. S. 707.

6. A special statute, which, while chartering a railroad corporation, authorizes counties on the line of the road to subscribe to its stock without a popular vote, a general statute requiring a popular vote being in force, is not void as conflicting with constitutional provisions that general laws shall not be suspended for the benefit of individuals, that laws for their benefit, inconsistent with the general law, shall not be passed, nor laws granting to them privileges or immunities other than those extended to others of the same class, and that property shall not be taken except by the law of the land, the constitution reserving to the legislature power to grant such charters of incorporation as may be deemed expedient for the public good. *Tipton County v. Rogers' Locomotive & Machine Works*, 103 U. S. 523.

7. A statute forbidding appeals from judgments fully affirming judgments under which the matter in controversy does not exceed a thousand dollars, is not inconsistent with a constitution which denies appeals, except in certain cases, where the matter does not amount to five hundred dollars. *Downham v. Alexandria*, 9 Wal. 659.

8. — *Constitutionality as affected by Mention of Subject-matter in Title.*] Where a constitution requires that a statute shall embrace but one object, and that this shall be expressed in its title, a statute will not be declared invalid for non-compliance on slight or technical grounds. If the title and the statute can fairly be reconciled, this will be done. *Montclair v. Ramsdell*, 107 U. S. 147; *Otoe County v. Baldwin*, 111 U. S. 1.

9. When the many details of a statute all relate to the one general subject embraced in its title, such statute relates to but one subject, within the meaning of such a constitutional provision. *Woodson v. Murdock*, 22 Wal. 351; *Louisiana v. Pilsbury*, 105 U. S. 278.

10. Thus, an act entitled "an act to consolidate" a city, "and to provide for the government and administration of its affairs," is not open to objection because it contains provisions not relating merely to the union of the different municipalities and the government of the city, but to all the various details into which the gen-

**STATUTE — CONSTITUTIONALITY — continued.**

eral administration of its affairs may lead. *Louisiana v. Pilsbury*, 105 U. S. 278.

11. Any expression in the title which calls attention to the subject thereof, although in general terms, fulfils the requirements of such a provision; an expression, for instance, speaking merely of amending the charter of a certain railroad company, the statute legalizing an election whereby a subscription to the stock of the company was voted. *Jonesboro v. Cairo & St. Louis Railroad Co.*, 110 U. S. 192.

12. Where a statute expresses the object thereof in its title, the title will be deemed to embrace the lawful means of achieving the object, thus fulfilling the constitutional requirement, as, for instance, a statute entitled "an act to incorporate the San Antonio Railroad Company," authorizing a city to take stock of the company, and to issue bonds, or otherwise to pledge the faith of the city, will not be deemed to conflict with the constitutional requirement. *San Antonio v. Mehaffey*, 96 U. S. 312.

13. Where matters not expressed in the title of a statute are so disconnected with matters expressed that they may be eliminated, the statute may stand as to matters so expressed, notwithstanding such a provision of the constitution. *Unity v. Burrage*, 103 U. S. 447.

14. A statute entitled "an act to legalize certain taxes," etc., is not objectionable as embracing a subject not expressed in its title, because it also legalizes an issue of bonds for the payment of which the taxes were imposed. The two subjects are not diverse. *Read v. Plattsburgh*, 107 U. S. 568.

15. A statute "to authorize independent school districts to borrow money and issue bonds therefor, for the purpose of erecting and completing school-houses, legalizing bonds heretofore issued, and making school orders draw six per cent interest in certain cases," is not open to the constitutional objection of embracing more than one subject and matters properly connected therewith. *Ackley School District v. Hall*, 113 U. S. 135.

**STATUTE — CONSTRUCTION — General Rules —**

*Statutes in pari materia — Intent of Legislature the Cardinal Rule, etc.*

See pl. 1-20.

*Aids to Construction — Preamble — Proviso — Title — Legislative Journals — Public Policy — Contemporary History — Other Statutes — Construction of Executive Department, etc.*

See pl. 21-39.

*Penal Statutes — Public Statute, what is — Recital in Private Statute, Effect of.*

See pl. 40-44.

1. — *General Rules — Statutes in pari materia — Intent of Legislature the Cardinal Rule, etc.*] Several statutes in *pari materia* are to be

**STATUTE — CONSTRUCTION — continued.**

considered as one in the ascertainment of their meaning. *Patterson v. Winn*, 11 Wheat. 380.

2. In construing a statute, it should be considered with all acts *in pari materia*. *United States v. Freeman*, 3 How. 556.

3. A repealing act and an act suspending its operation, passed at the same session, must be construed together as parts of one act, so that both may have effect. *Brown v. Barry*, 3 Dal. 365.

4. Where an English statute is adopted in our legislation, its settled contemporaneous construction is deemed to accompany and form a part of it. *Cathcart v. Robinson*, 5 Pet. 264; *McDonald v. Hovey*, 110 U. S. 619. See *Taylor v. Thompson*, 5 Pet. 358.

5. That construction should be given to a statute which will carry into effect the true intent of the legislature. *Brown v. Barry*, 3 Dal. 365; *Minor v. Mechanics' Bank*, 1 Pet. 46; *Binney v. Chesapeake & Ohio Canal Co.*, 8 Pet. 201.

6. A statute ought not to be so construed as to subvert the rights to property, unless such an intention be expressed in terms that admit of no doubt. *Rutherford v. Greene*, 2 Wheat. 196.

7. Words in a statute indicating a belief on the part of the legislature in the existence of a law which has no existence, may be such as to give it effect *in futuro*. *Postmaster-General v. Early*, 12 Wheat. 136.

8. In general, in the construction of public statutes, the word "may" is to be construed "must," if the legislature intend to impose a positive duty, and not merely to give a discretionary power. *Minor v. Mechanics' Bank*, 1 Pet. 46.

9. "Or" construed as "and," where the obvious intent of the statute required it. *Union Insurance Co. v. United States*, 6 Wal. 759.

10. In construing a statute, the words "single man" or "married man" may be taken in a generic sense, where the context and the object and provisions of the statute require it. *Silver v. Ladd*, 7 Wal. 219.

11. Whether a statute to confirm a void conveyance is to have that effect, depends not on a technical construction of its language, but on the actual intent of the legislature as gathered from the whole of it. *Wilkinson v. Leland*, 2 Pet. 627.

12. Where the enacting clause is general in its language and objects, a proviso thereto should be construed strictly, and as taking no case out of the provisions of such clause, if not fairly within its terms. *United States v. Dickson*, 15 Pet. 141.

13. The acts of congress are to be construed by the rules of the common law. *Rice v. Minnesota & Northwestern Railroad Co.*, 1 Black, 358.

14. Where the language of a statute presents no ambiguity, as read in the order of its clauses, the court will not attempt to qualify its meaning

**STATUTE — CONSTRUCTION — continued.**

by construction through a transposition of clauses, on the argument of a general intent. [GRIER and CLIFFORD, JJ., dissenting.] *Poor v. Considine*, 6 Wal. 458.

15. All laws should receive a sensible construction: general terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequences; and it will always be presumed that the legislature intended exceptions to its language which would avoid results of such a character. *United States v. Kirby*, 7 Wal. 482.

16. A statute will be construed in the light of every word used in it, it being presumed, where such a presumption is possible, that the legislature meant what it said. *Montclair v. Ramsdell*, 107 U. S. 147.

17. If the language of a statute is fairly susceptible of two constructions, both equally obvious and reasonable, one of which will bring it into harmony with the constitution, while under the other it is invalid, the former construction is to be adopted. *Grenada County Supervisors v. Brogden*, 112 U. S. 261.

18. A statute will not be construed as permitting gaming, prohibited by previous statutes, unless such construction cannot be avoided. To favor such construction, implications and intendments are not to be resorted to. *Aicardi v. Alabama*, 19 Wal. 635.

19. A statute in derogation of the common law must be strictly construed. Thus, an act *suspending* a repealing act was held not within the meaning of an act providing that the *repeal* of a repealing act should not revive the act first repealed. *Brown v. Barry*, 3 Dal. 365.

20. The Virginia statute of 1785, providing that acts should take effect from the day on which they were in fact passed, held inoperative on a repealing act and an act suspending it passed at the same session, in a case where there was a question as to whether the suspending act repealed the repealing act, the statute of 1789 providing that in such case the construction given should be the same as if the act of 1785 had never been passed. *Id.*

21. — *Aids to Construction — Preamble — Proviso — Title — Legislative Journals — Public Policy — Contemporary History — Other Statutes — Construction of Executive Department, etc.*] In case of ambiguity, the preamble may be resorted to in aid of the construction of the enacting clause. *Beard v. Rowan*, 9 Pet. 301.

22. In construing a statute, resort may be had to a proviso that has been repealed. *Savings Bank v. Collector*, 3 Wal. 495.

23. The title cannot be used to extend or restrain any positive provision in the body of an act; and it can be resorted to only where the meaning of the act is doubtful, and even then it has little weight. *Hadden v. Collector*, 5 Wal. 107.

**STATUTE — CONSTRUCTION — continued.**

24. Where the meaning of a statute is doubtful, the title may be resorted to, and especially where, under the state constitution, a statute may embrace but one subject, to be expressed in its title. *Myer v. Western Car Co.*, 102 U. S. 1.

25. A badly expressed and apparently contradictory statute, interpreted by reference to the journals of congress, where it appeared that the peculiar phraseology was caused by the introduction of an amendment without due reference to the original bill. *Blake v. National Banks*, 23 Wal. 307.

26. What is termed the policy of the government with reference to any particular legislation is too unstable a foundation for a judgment of the court in the interpretation of a statute. *Hadden v. Collector*, 5 Wal. 107.

27. Courts, in construing a statute, may recur to the history of the times, although not to the views of individual members of the legislature expressed in debate, or to their motives in voting for or against the statute. *United States v. Union Pacific Railroad Co.*, 91 U. S. 72.

28. The fact that a statute is referred to in subsequent statutes will not give it validity, if, otherwise, it is void, the reference not being intended as a re-enactment. *South Ottawa v. Perkins*, 94 U. S. 260.

29. Where the statute of limitations in the laws framed by commissioners for one of the territories, as published by authority of congress, contained a saving of the rights of persons "beyond seas," and the statute, in the same form, was retained in successive revisions of the laws under territorial and state authority, and acquiesced in by the courts and the people for more than thirty years, it was held that, whatever the effect of such acquiescence, the statute so revised must be taken to be the law, although the original manuscript adopted by the commissioners did not contain such a saving, those words having been erased. *Pease v. Peck*, 18 How. 595.

30. Where the meaning of a provision of the revised statutes is plain, the original act cannot be looked to, to see if congress may not have erred in the revision; this may be done only when necessary to construe language of doubtful import. *United States v. Bowen*, 100 U. S. 508; *Vietor v. Arthur*, 104 U. S. 493. Where, therefore, it is declared, as in section 4820, that "all such pensioners" shall surrender their pensions to the Soldiers' Home while there, the word "such" clearly referring to those who have not contributed to its funds, the earlier act cannot be referred to for authority to ignore the word "such" in the revision. *United States v. Bowen*, 100 U. S. 508.

31. Words used in an earlier, but omitted in a later act, cannot be read for the purpose of restricting the operation of the later act; and it makes no difference that, afterwards, such words were incorporated into the corresponding provision in a revision of the statutes; as where un-

**STATUTE — CONSTRUCTION — continued.**

enumerated vegetable substances "used for cordage" were subjected by the act of March 2, 1861 (12 Sts. 196), to a certain duty, and the words "used for cordage" were omitted from the act of July 14, 1862 (12 Sts. 554), but used in Rev. Sts. § 2504, these words cannot be deemed implied in the act of 1862, for the purpose of determining the rate to be imposed on an unenumerated vegetable substance, such as "jute rejections." *Wills v. Russell*, 100 U. S. 621.

32. Where, in construing the language of a code or a revision of statutes, there is a substantial doubt as to its meaning, the original statute may be looked to. *Myer v. Western Car Co.*, 102 U. S. 1.

33. On the question of whether a statute is valid, it is of no importance that it was assumed to be so in a case before the highest court of the state wherein its validity was not controverted, and, under the state practice, could not be controverted, the point not having been taken below. *Post v. Kendall County Supervisors*, 105 U. S. 667.

34. In the construction of a doubtful law, the contemporaneous construction of persons appointed to execute it, is entitled to great weight. *Stuart v. Laird*, 1 Cranch, 299; *Edward v. Darby*, 12 Wheat. 206; *United States v. North Carolina State Bank*, 6 Pet. 29; *United States v. Moore*, 95 U. S. 760; *Brown v. United States*, 113 U. S. 569; *The Laura*, 114 U. S. 411.

35. As, for instance, the construction of a general insurance act of a state being doubtful, the interpretation given by the attorney-general and other state officers required to act under it should have weight. *Union Insurance Co. v. Hoge*, 21 How. 35.

36. A construction of statutes, in relation to the accounts of individuals with the government, made by the proper accounting officers, is entitled to great consideration, especially when so long continued as to become a rule of departmental practice, and will, in general, be adopted by the federal courts. *United States v. Gilmore*, 8 Wal. 330.

37. But where, after the establishment of such construction, congress prohibits its application to a later statute, the courts will not enforce its application, if denied by the department, to a still later statute of the same class. *Id.*

38. The construction by the treasury department of statutes affecting its business, although entitled to respect, is not conclusive on the courts, as the courts are bound to construe all laws involved in cases before them in accordance with their own views. *United States v. Dickson*, 15 Pet. 141; *United States v. Graham*, 110 U. S. 219.

39. The supreme court, on the re-enactment of an internal revenue act in the language of the original act, is not bound by a construction put on the language of the original act by commissioners of internal revenue. There is no presumption

**STATUTE—CONSTRUCTION—continued.**

that congress intended to adopt such construction, especially where its adoption would make a proviso repugnant to the body of the act. *Dollar Savings Bank v. United States*, 19 Wal. 227.

40. — *Penal Statutes—Public Statute, what is—Recital in Private Statute, Effect of.* Although a penal law should be strictly construed, it should not be so construed as to defeat the obvious intention of the legislature. *American Fur Co. v. United States*, 2 Pet. 358.

41. The rule that penal statutes are to be strictly construed is not violated by allowing words to have their full meaning, or even the more extended of two meanings, where such construction best harmonizes the context and most fully promotes the policy and objects of the statute. *United States v. Hartwell*, 6 Wal. 385.

42. A statute legalizing elections held by the voters of a county on the question of issuing negotiable county bonds in aid of certain railroads, and authorizing all townships in counties in which township organization has been adopted, lying on or near the line of a certain road, on certain conditions to subscribe to stock and issue negotiable bonds therefor, is a public act. *Unity v. Burrage*, 103 U. S. 447.

43. When an act is declared therein to be a public act, an act supplementing and amending it must also be a public act. *Ib.*

44. A recital in a private statute is evidence of the facts recited only as against the person who procures the enactment. *Branson v. Wirth*, 17 Wal. 32.

**Charters of Corporations.**

See CORPORATION—CHARTER.

**Custom cannot control.**

See CUSTOM AND USAGE, 22.

**Decisions of State Courts construing, etc., State Statutes, followed by Federal Courts.**

See FEDERAL COURTS—STATE LAWS, RULES OF DECISION.

**Decisions of State Court construing Private Statute, not followed by Federal Courts.**

See FEDERAL COURTS—STATE LAWS, RULES OF DECISION, 121.

**Reconciliation of Conflicting Statutes.**

See DEED—REGISTRATION AND NOTICE, 23.

**Service of Process—Construction—Constructive Service.**

See WRIT AND PROCESS.

**STATUTE—ENACTMENT—What constitutes—Intent of Legislature—Seal—Approval of Executive—Effect, etc.]** A statute is operative from the date of its enactment, if no other date be fixed. *Matthews v. Zane*, 7 Wheat. 164.

2. Where a statute, like the Virginia statute of 1785, providing that acts shall take effect from the day on which they are in fact passed, is held inoperative, the English rule obtains, that acts of

**STATUTE—ENACTMENT—continued.**

the same session shall have effect from the same day. *Brown v. Barry*, 3 Dal. 365.

3. In Tennessee, since the adoption of the constitution of 1870, a bill becomes a law only on its approval by the governor, or its passage after his refusal to approve it. *Memphis v. United States*, 97 U. S. 293.

4. Under a constitutional provision, such as that of the Illinois constitution of 1848, that bills shall be presented to the governor to be signed if approved, a bill may become a law if signed within the specified time, although at the time of the signing the legislature has adjourned. *Seven Hickory v. Ellery*, 103 U. S. 423.

5. Congress may make the revival of an act conditional upon the happening of a contingency, and direct the president to make known such happening and revival by his proclamation. *The Aurora's Cargo*, 7 Cranch, 382.

6. The rights of parties under a statute which has expired will be preserved by a statute passed to revive it, although there be an interval between the two statutes, if the rights of third parties have not intervened in the interval. *Stephens v. McCargo*, 9 Wheat. 502.

7. It is not essential to the validity of the president's approval of a bill that he affix a date to his signature thereto. *Gardner v. New York*, 6 Wal. 499.

8. And if it be wanting, it may be ascertained by the court called on to fix it by resort to any source of information in its nature capable of conveying a satisfactory answer to the question, as in any case of question as to the time when a statute takes effect. *Ib.*

9. In Illinois, a statute is not valid, unless the legislative journals show it to have been regularly passed by both houses. *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Kendall County Supervisors*, 105 U. S. 667.

10. A constitutional requirement that the style of laws shall be, "It is enacted," etc., whether anything more than directory or not, cannot be deemed applicable to joint resolutions. *Hoyt v. Sprague*, 103 U. S. 613.

11. Where a bill designated as "an act to amend an act entitled 'an act to incorporate the Illinois Grand Trunk Railway,'" regularly passed the Illinois house of representatives, but in passing the senate the word "Illinois" was, by accident, omitted, the journals, however, showing no amendment, the bill retaining its house number, and there being nothing to throw doubt on its identity, it was held that the act was duly passed. *Walnut v. Wade*, 103 U. S. 683.

12. That article in the constitution of North Carolina which directs the seal of the state to be affixed to all grants, held not applicable to a statute itself the act of original appropriation. *Rutherford v. Greene*, 2 Wheat. 196.

13. Whether a seeming statute is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a



**STATUTE — ENACTMENT — continued.**

jury; and such is the rule in Illinois, as elsewhere. [WAITE, C. J., and CLIFFORD, SWAYNE, and STRONG, JJ., dissenting, and holding such not to be the rule in Illinois.] *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Kendall County Supervisors*, 105 U. S. 667.

14. There can be no estoppel in the way of ascertaining the existence of a law; as, for instance, bonds having been issued by a municipality under the authority of a seeming statute, the municipality, when sued on them, can under no circumstances be estopped to show that the statute was invalid because of the failure of the legislative journals to show its passage by the requisite majority in each house, such showing being necessary, under the rule declared by the state court, to its validity. [WAITE, C. J., and CLIFFORD, SWAYNE, and STRONG, JJ., dissenting.] *South Ottawa v. Perkins*, 94 U. S. 260.

15. If a court of law can, in any case, inquire into the motives of legislators for voting for a law, it cannot do so collaterally, in a suit between individuals to which the state is not a party. *Fletcher v. Peck*, 6 Cranch, 87.

*Decisions of State Courts respecting Formalities necessary to an Enactment — Followed by Federal Courts.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 101, 102.

**STATUTE — IN GENERAL — Act of Congress, in Case of Conflict, governed by the Constitution.**

See CONSTITUTION, 2.

*Entail may be barred by Private Statute, when.*  
See ESTATE TAIL.

*Exemplified Copy of State Statute with Seal of State, admissible in Evidence.*

See EVIDENCE — DOCUMENTARY, 40.

*Legislative Declaration that a Bridge is a Lawful Structure — Effect on Judgment of Court that it is a Nuisance.*

See JUDGMENT — OPENING AND REVERSAL, 19.

*Pleading — Matter of Defence.*

See PLEADING — PLEA TO MERITS, 4.

*Prospective, when — When retrospective — Construction.*

See RETROSPECTIVE LAW.

*Questions affording Ground of Error to State Court.*

See ERROR TO STATE COURT — JURISDICTION.

*Statute saving a Custom — Effect.*

See CUSTOM AND USAGE, 15.

**STATUTE — PARTICULAR STATUTES — Attainder — Bill of — Legislative Act inflicting Punishment without Trial.**

See ATTAINDER.

**STATUTE — PARTICULAR STATUTES — continued.**

*Confederate Statutes confiscating Property of Loyal Citizens void.*

See CONFISCATION, 58 *et seq.*

*Confirming Claims to Lands under Spanish and Mexican Grants.*

See LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS.

*Ex Post Facto Laws within Meaning of Constitution.*

See EX POST FACTO LAW.

*Frauds — Statute of — In general.*

See FRAUDS — STATUTE OF.

*Fraudulent Conveyances — Statute avoiding — Liberally construed.*

See FRAUDULENT CONVEYANCE, 1.

*Limitation — Statutes of.*

See LIMITATION.

*Power — Failure to grant implies a Denial, when.*

See NATIONAL BANK, 12.

*Ratifying Past Acts — How far effective.*

See REBELLION, 18.

*Retrospective Laws in general.*

See RETROSPECTIVE LAW.

*States in Rebellion — Validity of Statutes.*

See GOVERNMENT BONDS, 8, 9; STATES — RIGHTS AND POWERS, 20–22.

*Statute authorizing Changes in Channel or Course of River.*

See WATERS, 10.

*Taxation — Statutes exempting, etc.*

See TAX — POWER.

*Usury Laws — Constitutionality and Construction.*

See USURY.

**STATUTE — REPEAL — What constitutes — How shown — Repeal by Implication.**

See pl. 1–12.

*Effect of Repeal on Pending Proceedings.*

See pl. 13–16.

1. — *What constitutes — How shown — Repeal by Implication.*] A recital in a statute that a former statute has been repealed or superseded is not conclusive in respect thereto. Whether a statute has been repealed is a judicial, not a legislative, question. *United States v. Clafflin*, 97 U. S. 546.

2. What amounts to a repeal of a statute. *Davies v. Fairbairn*, 3 How. 636.

3. A statute on the subject of a prior statute, embracing all its provisions and also others, and imposing different or additional penalties, operates as a repeal of such prior statute, without a repealing clause. *United States v. Tynen*, 11 Wal. 88.

4. To repeal a statute by implication there must be such a positive repugnancy between the

**STATUTE — REPEAL — continued.**

provisions of the new law and the old that they cannot stand together or be consistently reconciled. *Wood v. United States*, 16 Pet. 342; *McCool v. Smith*, 1 Black, 459; *Furman v. Nichol*, 8 Wal. 44; *Ex parte Yerger*, 8 Wal. 85; *United States v. Henderson's Tobacco*, 11 Wal. 652; *Clay County v. Savings Society*, 104 U. S. 579; *Louisiana v. Taylor*, 105 U. S. 454; *Ex parte Crow Dog*, 109 U. S. 556; *Chew Heong v. United States*, 112 U. S. 536. And see *McKee v. United States*, 8 Wal. 163; *Fussell v. Gregg*, 113 U. S. 550.

5. And even then the old law will be repealed only to the extent of such repugnancy. *Wood v. United States*, 16 Pet. 342; *McCool v. Smith*, 1 Black, 459.

6. An affirmative statute containing no expression of a purpose to repeal an existing statute will not be deemed to repeal it, there being no irreconcilable conflict between them, and the later statute not covering the whole ground of the earlier one, and it not being clear that it was not intended as a substitute for it. *Red Rock v. Henry*, 106 U. S. 596.

7. Repeals of revenue and collection laws, by implication, are not favored. *United States v. Sixty-seven Packages*, 17 How. 85; *United States v. Walker*, 22 How. 299.

8. Where the provisions of a special charter or of a special legislative authority may reasonably consist with a general statute, the two may stand together, one as the law of the particular case, and the other as the general law of the land, although the words of the two are not in exact harmony. *South Carolina v. Stoll*, 17 Wal. 425.

9. And where a state has publicly promised that the notes of a bank in which it is the sole stockholder, and for whose notes it is liable, shall be taken in payment of taxes and of other dues to the state, and has so impressed on the notes the credit of the state, the state, in proceeding to terminate its obligation, as on reasonable notice it may as to notes subsequently issued, is bound to use words that may not be misunderstood. A doubtful or obscure declaration will not suffice. *Ib.*

10. Thus, the South Carolina statute of 1843, providing that all state taxes should be paid in specie "or the notes of specie-paying banks," did not operate, in view of the different kinds of banks then existing in the state and of legislation in regard to them, to repeal the section of the charter of the state bank which provided that its bills or notes payable in coin should be receivable in payment of taxes and of other dues to the state, but is to be deemed to have referred to the notes of banks then in existence which were then actually paying specie. [BRADLEY, J., dissenting.] *Ib.*

11. A provision in a bank charter making its notes receivable by the state in payment of taxes or other dues is not repealed by implication by a statute which makes other current bank-notes re-

**STATUTE — REPEAL — continued.**

ceivable also, the two enactments being capable of standing together. *Furman v. Nichol*, 8 Wal. 44.

12. An amendatory statute which covers the entire subject-matter of the original statute, and the provisions of which are inconsistent with those of the original statute, repeals it by implication. *Pana v. Bowler*, 107 U. S. 529.

13. — *Effect of Repeal on Pending Proceedings.*] When jurisdiction depends wholly on a statute, suits brought while it is in force fall with its repeal, there being no reservation as to pending cases. *Merchants' Insurance Co. v. Ritchie*, 5 Wal. 541; *Gates v. Osborne*, 9 Wal. 567; *Baltimore & Potomac R. R. Co. v. Grant*, 98 U. S. 398; *South Carolina v. Gaillard*, 101 U. S. 433.

14. An act legalizing a bridge over a navigable river will abate a suit brought to enjoin its construction as a nuisance, although the suit be ready for hearing. *The Clinton Bridge*, 10 Wal. 454.

15. On the repeal of a penal statute, without reservation of its penalties, all pending proceedings thereunder fall. *Norris v. Crocker*, 13 How. 429; *United States v. Tynen*, 11 Wal. 88.

16. An offence against a temporary act cannot be punished after the act has expired, unless some provision be made for that purpose; and a proviso in an act repealing such act, that persons may be punished for past offences as if the act had not been repealed, is not such a reservation. *The Irresistible*, 7 Wheat. 551.

*Effect on Jurisdiction of Supreme Court — Power of Congress to repeal Act giving Supreme Court Jurisdiction.*

See SUPREME COURT — JURISDICTION, 11, 12.

*Effect on Right of Action — On Pending Suit.*  
See PILOT, 7.

*Repeal or Expiration pending Appeal or Writ of Error — Effect — Repeal — Remand.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 417 *et seq.*, 492.

**STIPULATION — Admiralty — Extent of Obligation of Stipulators.**

See ADMIRALTY — PRACTICE, 16 *et seq.*

*Concerning Conduct of Trial, Construction of.*

See TRIAL — REGULATION OF TRIALS, 3.

*Waiving Jury Trial.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 359, 361.

**STREET RAILROAD — Duty respecting Crossings — Transfer of Right to use Streets.**]

The duty of street-railway companies with respect to people crossing their tracks, and of people so crossing, considered and stated. *Washington & Georgetown Railway Co. v. Gladmon*, 15 Wal. 401.

2. In Louisiana, a street-railroad company may transfer by mortgage its right to use the public

**STREET RAILROAD** — *continued.*

*Streets. New Orleans, Spanish Fort, & Lake Railroad Co. v. Delamore*, 114 U. S. 501.

*Charter — In general.*

See CORPORATION — CHARTER, 13, 14.

*Contracts for grading, etc. — Construction.*

See CONTRACT — CONSTRUCTION, 41.

*Contracts to construct — What constitutes.*

See CONTRACT — WHAT CONSTITUTES, 9.

*Right of Legislature to permit one Street Railroad Company to use Tracks of another.*

See CORPORATION — CHARTER, 13.

*Right to use Streets passes to Assignee in Bankruptcy.*

See BANKRUPTCY — PROCEEDINGS TO CONVERT ESTATE.

**STREETS** — *Grading — Powers of Municipal Corporation.*

See MUNICIPAL CORPORATION — POWERS IN GENERAL, 1-4.

*Liability of Municipal Corporation for Defects.*

See MUNICIPAL CORPORATION — LIABILITY, 6-16.

*Powers, etc., of Municipal Corporations, respecting.*

See MUNICIPAL CORPORATION — POWERS IN GENERAL, 1-4, 27; MUNICIPAL CORPORATION — LIABILITY, 5.

*Railroads — Right to run Locomotives in Streets.*

See RAILROAD — COMPANY, 32.

*Railroads — Rights and Duties respecting.*

See STREET RAILROAD.

*Railroads — Right to lay Tracks therein.*

See RAILROAD — PARTICULAR ROADS.

**SUB-CONTRACTOR** — *Right to recover for Performance although the Work is rejected by the one for whom it is done.*

See CONTRACT — PERFORMANCE AND BREACH, 7.

**SUBJECTS** — *Meaning of Word as used in Treaty.*

See TREATY, 27.

**SUBPOENA** — *Equity — When not necessary on Supplemental Bill.*

See EQUITY PLEADING — SUPPLEMENTAL BILL, 7.

*Witness — In general.*

See WITNESS.

**SUBROGATION** — *Application of the Doctrine — Sureties — Mortgagees, etc.] The doctrine of subrogation has no application to the question of whether one who has paid coupons and taken a transfer of them, has a right to treat them as not extinguished. Ketchum v. Duncan*, 96 U. S. 659.

**SUBROGATION** — *continued.*

2. Where co-sureties execute each to the other a mortgage conditioned to indemnify him as to a portion of his liability, the creditor of the principal cannot be subrogated to their rights thereunder, and, if otherwise, he could not resort to the security where neither surety had met, nor could meet, that portion of the liability which by the agreement with his co-surety he assumed. *Hampton v. Phipps*, 108 U. S. 260.

3. The estate of a purchaser in confiscation proceedings will terminate on the death of the original owner, although when the proceedings were instituted the property was subject to mortgage, and the mortgagee intervened, and the purchase-money was by decree of court paid to the mortgagee. Neither the purchaser nor the United States can be deemed to be subrogated to the rights of the mortgagee. His debt is paid *pro tanto*. *Waples v. Hays*, 108 U. S. 6.

4. The surety on a bail-bond given to the United States in a criminal proceeding is not, by payment, subrogated to the right of the United States to claim priority of payment from the insolvent estate of the principal; to apply the principal of subrogation to such a case would be against public policy. *United States v. Ryder*, 110 U. S. 729.

5. Nor does Rev. Sts. § 3468, providing that "whenever the principal in any bond given to the United States is insolvent," the surety, on payment, shall be substituted to the priority of the United States, affect the case, recognizances in criminal cases not being embraced therein. *Id.*

*Doctrine not applicable, where.*

See MORTGAGE — PAYMENT, 1.

*Indorser paying Judgment against Maker of Note.*

See BILLS AND NOTES — INDORSEMENT, 7.

*Insurer who pays Loss, subrogated to Owner's Rights against Carrier.*

See INSURANCE — MARINE, 144.

*Insurer who pays Loss on Goods in Transit, subrogated to Rights of Shipper against Carrier.*

See INSURANCE — FIRE, 49, 56.

*Joint Mortgagors — First and Second Mortgagees.*

See MORTGAGE — SUBROGATION.

*Surety who pays Government subrogated to Government's Right to Priority of Payment.*

See UNITED STATES — PRIORITY OF PAYMENT, 32.

**SUBSCRIPTIONS** — *By Municipalities in Aid of Railroads, etc.*

See MUNICIPAL BONDS; MUNICIPAL CORPORATION — FISCAL POWERS.

**SUBSTITUTED SERVICE** — *Process — In general.*

See WRIT AND PROCESS, 8 *et seq.*

**SUBSTITUTION** — *Personal Representative in Pending Suit.*

See EXECUTOR AND ADMINISTRATOR — SUITS, 21 *et seq.*

**SUCCESSION TAX** — *Under Internal Revenue Acts of 1864, 1866 — In general — Not a Direct Tax, but an Impost or Excise, etc.*

See INTERNAL REVENUE — PERSONS AND THINGS TAXED, 97 *et seq.*

**SUFFRAGE** — *Right not a Privilege of Citizenship protected by the Constitution — Right of Negro.*

See CIVIL RIGHTS.

**SUICIDE** — *The meaning of the word. See Bigelow v. Berkshire Life Insurance Co., 93 U. S. 284.*

*Affecting Contract of Life Insurance — What constitutes.*

See INSURANCE — LIFE, 40 *et seq.*

**SUITS** — *Abatement by Alteration of Law.*

See STATES — SUITS, 5.

*Abatement by Repeal of Statute on which Jurisdiction depends.*

See STATUTE — REPEAL, 13 *et seq.*

*Audita Querela is a Regular Suit.*

See UNITED STATES — SUITS, 11.

*Beginning for the Purpose of stopping the running of the Statute of Limitations.*

See LIMITATION — EXCEPTIONS AND INTERRUPTIONS, 14 *et seq.*

*Common Law — What are Suits at, within the Seventh Amendment of the Constitution.*

See JURY, 45.

*Equity — What a Suit is.*

See REMOVAL OF CAUSES, 24, 26.

*Judiciary Act — What constitutes a Suit within the Meaning.*

See ERROR TO STATE COURT — JURISDICTION, 8.

*Mere Non-resistance to Suit, not Fraudulent Preference.*

See BANKRUPTCY — PRIOR TRANSACTIONS, 53, 54.

*Original — What Suits are, and what Incidents.*

See CIRCUIT COURT — JURISDICTION, 110 *et seq.*

*Pending — When, so as to be Constructive Notice.*

See LIS PENDENS, 2.

*Proceedings to annul a Will as a Muniment of Title, and to restrain Probate, a Suit.*

See CIRCUIT COURT — JURISDICTION, 36.

*Proceedings to take Land in Exercise of Right of Eminent Domain, a Suit.*

See CIRCUIT COURT — JURISDICTION, 35.

**SUITS** — *continued.*

*States — Suits by and against.*

See STATES — SUITS.

*Writ of Error by Assignee in Bankruptcy to revise Judgment against Bankrupt.*

See BANKRUPTCY — PROCEEDINGS TO CONVERT ESTATE, 32.

**SUMMONS** — *Service, etc. — In general.*

See WRIT AND PROCESS.

**SUMMONS AND SEVERANCE** — *Necessity — When necessary.*

See ERROR — BRINGING AND PERFECTING, 4, 5.

*Necessity — Effect — Proceedings equivalent.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 124, 129.

*Proceedings affecting Parties left out.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 229.

**SUNDAY** — *Injury received on Sunday by one about his Usual Employment — Delivery by Carrier — Contracts.] It is no defence to an action for damages caused by the negligence of the defendant that the injury was received on Sunday while the plaintiff was about his usual employment, in violation of the local law, certainly where the injury was to a vessel engaged in commerce and sailing on a navigable river. Philadelphia, Wilmington, & Baltimore Railroad Co. v. Philadelphia & Havre de Grace Steam Towboat Co., 23 How. 209.*

2. Where there was a contract between the plaintiffs and the defendants, who were carriers over connecting lines, the plaintiffs by water and the defendants by land, that goods taken by the plaintiffs to go over the defendants' line should be left for them at a certain point, and it had been the custom for the plaintiffs to store goods arriving at that point on Sunday in the defendants' warehouse, to be forwarded on Monday, it was held that for goods so stored, and destroyed by fire on the same day, the plaintiffs, having had to answer in damages to the shipper therefor, might recover of the defendants, notwithstanding the Sunday law of Virginia, forbidding labor on that day under a penalty, the contract with the shipper not having been made on that day, and the obligation of the defendants to keep the goods safely being unaffected by the violation of the law, if any, in putting the goods in the warehouse. *Powhattan Steamboat Co. v. Appomattox Railroad Co., 24 How. 247.*

3. Notice of a rescission of a contract is not to be deemed ineffectual because given on Sunday in a state where, as in Nevada, there is no statute affecting the case. *Pence v. Langdon, 99 U. S. 578.*

4. A contract signed on Sunday, but delivered afterwards on a week day, is not invalid under a statute forbidding, under a penalty, the doing of

**SUNDAY** — *continued.*

business on the first day of the week. *Gibbs & Sterrett Manufacturing Co. v. Brucker*, 111 U. S. 597.

5. Nor is a contract made on Sunday by an agent without authority and without the knowledge of his principal, and ratified by the principal on a week day. *Ib.*

**SUPERCARGO** — *Agent of Insurer on Abandonment.*

See **INSURANCE** — **MARINE**, 120.

**SUPERIOR FORCE** — *What constitutes, as relieving Bank from Liability in Time of War.*

See **BANK**, 27.

**SUPERSedeas** — *Effect — Liability of Sureties on Bond.*] At common law a *supersedeas*, in order to stay proceedings on execution, must come before levy, otherwise the sheriff may sell on a writ of *vend. ex.* *Boyle v. Zacharie*, 6 Pet. 648.

2. Section 1007, Rev. Sts., which, as amended by the act of February 18, 1875 (18 Sts. 316), provides that, where a writ of error may operate as a *supersedeas*, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference only to the judgments of the federal courts. *Doyle v. Wisconsin*, 94 U. S. 50; *Foster v. Kansas*, 112 U. S. 201.

3. The sureties on a *supersedeas* bond given upon the removal of a case, by writ of error, from the district to the circuit court become liable on the affirmance of the judgment, although no execution is taken out against the principal. *Babbitt v. Finn*, 101 U. S. 7.

4. Nor is their liability affected by the fact that another *supersedeas* bond was given to remove the case from the circuit court to the supreme court. *Ib.*

*Appeal — When taken for Purposes of Supersedeas.*

See **APPEAL** — **TAKING AND PERFECTING**, 25 *et seq.*, 73-78.

*Awarded by Supreme Court — How enforced — When vacated or modified.*

See **APPEAL AND ERROR** — **PROCEEDINGS** ABOVE, 66 *et seq.*

*Injunction at Common Law, not.*

See **INJUNCTION**, 55.

*Quashed by Circuit Court, when.*

See **APPEAL AND ERROR** — **PROCEEDINGS** ABOVE, 72.

*Writ of Error — When to operate as Supersedeas.*

See **ERROR** — **BRINGING AND PERFECTING**, 22 *et seq.*, 52 *et seq.*, 62 *et seq.*

**SUPPLEMENTAL BILL** — *Equity — In general.*

See **EQUITY PLEADING** — **SUPPLEMENTAL BILL**.

**SUPPLIES** — *Ships — Liens.*

See **MARITIME LIEN**, 5 *et seq.*

**SUPREME COURT** — *Jurisdiction in general.*

See **SUPREME COURT** — **JURISDICTION**.

*Miscellaneous Matters.*

See **SUPREME COURT** — **IN GENERAL**.

*Practice in general.*

See **SUPREME COURT** — **PRACTICE**.

*Review of Action of Interior Department — Land Cases.*

See **LANDS OF UNITED STATES** — **LAND OFFICE**, 34.

**SUPREME COURT** — **IN GENERAL** — *Construction of Internal Revenue Act.*

See **STATUTE** — **CONSTRUCTION**, 39.

*Copies of Opinions to be certified by Reporter.*

See **EVIDENCE** — **DOCUMENTARY**, 32.

*Decision as to Constitutionality of State Statute conclusive in State Courts.*

See **STATE COURTS**, 6.

*Decree for Salvage — Power to alter.*

See **SALVAGE**, 30.

*Frivolous Appeals — Power to prevent — Only Power to adjudge Damages.*

See **APPEAL AND ERROR** — **PROCEEDINGS** ABOVE, 534.

*Judgment — In general.*

See **JUDGMENT**.

*Judgment of Divided Court conclusive.*

See **JUDGMENT** — **CONCLUSIVENESS**.

*Proceedings of State Court in a Cause removed — Court cannot interfere with.*

See **REMOVAL OF CAUSES**, 149.

*Reports of Decisions — Not Evidence.*

See **EVIDENCE** — **DOCUMENTARY**, 50.

*Right of Judges to hold Circuit Court.*

See **CONSTITUTION**, 3.

*Rule in Admiralty authorizing Proceedings in Rem in Certain Cases — Power to make.*

See **ADMIRALTY** — **PRACTICE**, 12.

*State Laws as Rules of Decision.*

See **FEDERAL COURTS** — **STATE LAWS**, **RULES OF DECISION**.

*State Laws — Court has no Power to declare void as in conflict with State Constitution.*

See **ERROR TO STATE COURT** — **IN GENERAL**, 6.

**SUPREME COURT** — **JURISDICTION** — *Original Jurisdiction — Origin — Limits — Suits between States.*

See pl. 1-8.

*Appellate Jurisdiction — In general — Origin — Limits — Jurisdiction as affected by Consent — Matter in Controversy.*

See pl. 9-31.

**SUPREME COURT — JURISDICTION — continued.**

*Appellate Jurisdiction to Circuit Court — In general — In Criminal Cases — In Habeas Corpus Cases — To review Supervisory Proceedings in Bankruptcy — As depending on the Amount in Dispute.*

See pl. 32-54.

*Appellate Jurisdiction to District Court — When the Court has Circuit Court Jurisdiction — In Bankruptcy — In California Land Cases.*

See pl. 55-59.

*Appellate Jurisdiction to Courts of the District of Columbia — Circuit Court — Supreme Court.*

See pl. 60-73.

*Appellate Jurisdiction to Court of Claims.*

See pl. 74-78.

*Appellate Jurisdiction to Territorial Courts.*

See pl. 79-91.

1. — *Original Jurisdiction — Origin — Limits — Suits between States.*] That provision of the constitution which declares in what cases the supreme court shall have original jurisdiction is to be construed as a denial of such jurisdiction in all other cases. *Ex parte Vallandigham*, 1 Wal. 243.

2. Congress cannot confer original jurisdiction on the supreme court. *Marbury v. Madison*, 1 Cranch, 137.

3. Where the supreme court has original jurisdiction under the constitution, as, e. g., of a suit between two states, its exercise does not depend on the existence of any act of congress regulating the mode thereof. *Kentucky v. Denison*, 24 How. 66.

4. The supreme court has jurisdiction of a suit in equity, brought by one state against another, to determine a question of disputed boundary. *Rhode Island v. Massachusetts*, 12 Pet. 657.

5. It has original jurisdiction of controversies between states concerning their boundaries, although the decision thereof may affect the territorial limits of the political jurisdiction and sovereignty of the parties. *Virginia v. West Virginia*, 11 Wal. 39.

6. Its original equity jurisdiction extends to a suit by a state for the abatement of a nuisance caused by the erection of a bridge, to the obstruction of the navigation of a river flowing out of the state, the state having constructed and owning canals and railways connecting with the river, from which it derives tolls; and it makes no difference that the bridge is in another state. [TANEY, C. J., and DANIEL, J., dissenting.] *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518.

7. Membership of a state in a private corporation does not give the supreme court original jurisdiction of a suit to which the corporation is a party. *United States Bank v. Planters' Bank*,

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9 Wheat. 904; *Kentucky Bank v. Wister*, 2 Pet. 318.

8. In a suit by a state against a corporation, an averment that the defendant is a body politic "in the law of" another state, and "doing business in" such state, is not sufficient to give the supreme court original jurisdiction as of a suit between a state and a citizen of another state, it being conceivable that the defendant is not a creation of the law of another state, but is merely doing business in such state through an agent. *Pennsylvania v. Quicksilver Mining Co.*, 10 Wal. 553.

9. — *Appellate Jurisdiction — In general — Origin — Limits — Jurisdiction as affected by Consent — Matter in Controversy.*] The description in the judiciary act of 1789 (1 Sta. 73), of the appellate power of the supreme court is to be construed as a denial of such appellate power as it does not comprehend; but it is not necessary that the appellate jurisdiction should be expressly given by an act of congress; it is enough if an intent to allow it can be ascertained. *Durousseau v. United States*, 6 Cranch, 307.

10. The supreme court cannot, through an order of transfer from the circuit court, acquire jurisdiction of a prize cause pending there on appeal from the district court, although the transfer is expressly authorized by statute. There is no existing decree over which an appellate jurisdiction may be exercised, and such a provision is to be regarded as an attempt inadvertently made to confer a jurisdiction withheld by the constitution. *The Alicia*, 7 Wal. 571.

11. Although appellate jurisdiction is conferred on the supreme court by the constitution, it is conferred subject to such exceptions as congress may make; and an act affirming such jurisdiction is construed as a negation of jurisdiction in all cases not expressly described, and a repeal of such act, as a denial of it in those cases also. *Ex parte McCordle*, 7 Wal. 506. And see *Ex parte Yerger*, 8 Wal. 85.

12. Congress has power, pending an appeal in the supreme court, to repeal the statute under which the court has appellate jurisdiction of the case, and if the power be exercised, the appeal falls. *Ex parte McCordle*, 7 Wal. 506. And see *Norris v. Crocker*, 13 How. 429; *Merchants' Insurance Co. v. Ritchie*, 5 Wal. 541.

13. Except as provided by statute, the appellate jurisdiction of the supreme court, based on the value of the subject-matter of the suit, does not attach because the question involved is one of federal law. *Adams v. Crittenden*, 106 U. S. 576.

14. The judgment of a court of competent jurisdiction, provided for by Rev. Sta. § 2326, where the right to a patent for mineral lands is contested, may be reviewed by the supreme court in a case otherwise proper. *Chambers v. Harrington*, 111 U. S. 350.

15. Although the supreme court derives its

**SUPREME COURT — JURISDICTION — continued.**

appellate jurisdiction from the constitution, it can exercise it only in conformity with such regulations as congress may prescribe. *Wiscart v. Dauchy*, 3 Dal. 321; *Jennings v. The Perseverance*, Id. 336; *United States v. Hooe*, 1 Cranch, 318.

16. Parties, therefore, cannot by agreement authorize the supreme court to exercise appellate jurisdiction where it is not given by the law. *The Lucy*, 8 Wal. 307.

17. Nor in any mode other than that prescribed by law. *Kelsey v. Forsyth*, 21 How. 85; *Montgomery v. Anderson*, Id. 386; *Balance v. Forsyth*, Id. 389.

18. Thus, the parties cannot by agreement give the supreme court jurisdiction of an appeal from a decree of the circuit court affirming a decree of the district court which was not final, and from which, therefore, no appeal could lie. *Montgomery v. Anderson*, 21 How. 386.

19. Nor of an appeal in a case which should be brought up by writ of error or a certificate of division. *United States v. Emholt*, 105 U. S. 414.

20. Nor can they bring a case within the jurisdiction by mere agreement without writ of error or appeal. *Washington County v. Durant*, 7 Wal. 694.

21. Nor, where the pleadings distinctly show that the value of the matter in controversy is less than the jurisdictional sum, can the parties confer jurisdiction by stipulation that judgment shall be entered for more than that sum, if that court shall consider the plaintiff entitled to recover at all. *Webster v. Buffalo Insurance Co.*, 110 U. S. 386.

22. The supreme court will not take cognizance of an action brought up on an agreed case. *Dewhurst v. Coulthard*, 3 Dal. 409.

23. Nor of a cause transferred by consent of parties from a circuit court, where it is pending on appeal. *The Nonesuch*, 9 Wal. 504.

24. Under Rev. Sts. § 692, which provides for an appeal from all final decrees, an appeal lies to the supreme court from a decree of the circuit court rendered by consent. *Pacific Railroad Co. v. Ketchum*, 101 U. S. 289.

25. Where the jurisdiction of the supreme court is limited by the amount in controversy, the matter in dispute must be money, or some right the value of which, in money, can be calculated and ascertained. *Ritchie v. Mauro*, 2 Pet. 243; *Barry v. Mercein*, 5 How. 103; *Pratt v. Fitzhugh*, 1 Black, 271; *De Krafft v. Barney*, 2 Black, 704; *Youngstown First National Bank v. Hughes*, 106 U. S. 523.

26. Thus, it can have none in case of a claim to the guardianship of children, although the value of their estate is more than the jurisdictional sum. The matter in dispute is the value of the office, and the office has no value except as it affords compensation to be earned. *Ritchie v. Mauro*, 2 Pet. 243.

**SUPREME COURT — JURISDICTION — continued.**

27. Nor when the claim is based on considerations other than the pecuniary value of the office. *De Krafft v. Barney*, 2 Black, 704.

28. Nor to review the judgment of a circuit court on a writ of *habeas corpus ad subjiciendum*. *Barry v. Mercein*, 5 How. 103. But see *Ex parte McCardle*, 6 Wal. 318; *Ex parte Royall*, 112 U. S. 181. pl. 41, 42, *infra*.

29. Thus, a judgment or order of a circuit court discharging prisoners on such a writ is not a judgment which the supreme court can reverse; and it makes no difference that they were held on a *capias* to answer a decree of the same court in admiralty for more than two thousand dollars. *Pratt v. Fitzhugh*, 1 Black, 271.

30. Nor can it review on error, at suit of an attorney, a decision as to the removal of the seat of government of a territory, the other parties to the controversy being government officials, but not appearing in their official capacity, and not claiming any personal interest, but only stating that, if a removal is had, the United States will be put to an expense of three thousand dollars. The attorney's interest in such removal cannot be measured in money. It is not in any sense property. *Potts v. Chumaseo*, 92 U. S. 353.

31. The appellate jurisdiction of the supreme court as depending on the matter in dispute, considered on all the authorities. *Hilton v. Dickinson*, 108 U. S. 165.

32. — *Appellate Jurisdiction to Circuit Court — In general — In Criminal Cases — In Habeas Corpus Cases — To review Supervisory Proceedings in Bankruptcy — As depending on the Amount in Dispute.* Error does not lie to the supreme court to review the judgment of a circuit court in a civil action which has been taken to the circuit court from a district court by writ of error. *United States v. Goodwin*, 7 Cranch, 108; *United States v. Gordon*, Id. 287; *United States v. Barber*, 2 Wheat. 395; *Sarchet v. United States*, 12 Pet. 143. Now otherwise by act of July 4, 1843, § 3 (5 Sts. 393).

33. Although now otherwise by the act of March 3, 1863 (12 Sts. 760), allowing appeals in prize causes from the district to the supreme court, a case carried by appeal from a district court to a circuit court before the passage of that act was held to be properly in the supreme court on appeal from the circuit court. *The Admiral*, 3 Wal. 603.

34. In prize causes the supreme court has an appellate jurisdiction only, and will not allow a new claim to be interposed on appeal, but will remand the cause, that it may be presented below. *The Harrison*, 1 Wheat. 298.

35. The supreme court has jurisdiction to review a decision of a circuit court in a proceeding on a private claim to land in California, transferred to it under the act of July 1, 1864 (13 Sts. 333), such a proceeding being in the nature of a proceeding in equity. [GIBB, MILLER, and FIELD, JJ.,

**SUPREME COURT — JURISDICTION — continued.**  
dissenting.] *United States v. Circuit Judges*, 3 Wal. 673.

36. An appeal lies to the supreme court from a decree in admiralty of a provisional court established by order of the president in a southern state during the rebellion, as from a decree of the circuit court, congress having directed that decrees of the provisional court, proper under ordinary circumstances to the jurisdiction of the circuit court, should be transferred to the circuit court and have effect as if originally rendered therein. The decree, for the purposes of appeal, is the decree of the circuit court. *The Grapeshot*, 9 Wal. 129.

37. The act of May 26, 1824 (4 Sts. 62), to regulate the practice of the federal courts in Louisiana, does not give the supreme court power to re-examine the facts of a case at law which has been tried by a jury. *Parsons v. Bedford*, 3 Pet. 433.

38. The supreme court has no appellate jurisdiction in criminal cases, except where the judges certify a division of opinion on some matter arising on the trial. *Ex parte Gordon*, 1 Black, 503; *Ex parte Watkins*, 3 Pet. 193.

39. Thus, a proceeding for contempt, independent of and separate from the suit out of which it grows, cannot be re-examined by the supreme court on appeal. *New Orleans v. Steamship Co.*, 20 Wal. 387.

40. Nor on writ of error. *Hayes v. Fischer*, 102 U. S. 121.

41. Under the act of February 5, 1867 (14 Sts. 385), in amendment of the judiciary act, an appeal lies to the supreme court from a judgment in *habeas corpus* rendered by a circuit court in the exercise of original jurisdiction. *Ex parte McCordle*, 6 Wal. 318. But see pl. 42, *infra*.

42. The supreme court cannot, on appeal, review the proceedings of the circuit court on *habeas corpus*. While the right of appeal was given by the act of February 5, 1867 (14 Sts. 385), it was taken away by the act of March 27, 1868 (15 Sts. 44). Whatever jurisdiction the supreme court has in such a case it acquires through its own writ of *habeas corpus*, and, until that is issued, it has no power to proceed. *Ex parte Royall*, 112 U. S. 181.

43. No appeal lies to the supreme court from a decree of a circuit court rendered in the exercise of the supervisory jurisdiction conferred by the bankrupt act of March 2, 1867, § 2 (14 Sts. 518). *Morgan v. Thornhill*, 11 Wal. 65; *Hall v. Allen*, 12 Wal. 452; *Mead v. Thompson*, 15 Wal. 635; *Coit v. Robinson*, 19 Wal. 274; *Sandusky v. Indianapolis First National Bank*, 23 Wal. 289; *Conro v. Crane*, 94 U. S. 441; *Milner v. Meek*, 95 U. S. 252; *Nimick v. Coleman*, 95 U. S. 266.

44. And it makes no difference that the case was brought from the district court by writ of error. No particular form of proceeding is re-

**SUPREME COURT — JURISDICTION — continued.**  
quired. *Cleveland Insurance Co. v. Globe Insurance Co.*, 98 U. S. 366.

45. But where a case, really a case in equity within the meaning of section 8 of the act, is brought to the circuit court by petition under section 2, giving that court general supervision of cases arising under that act, and a decision is made in favor of the petitioner reversing the decree of the district court, the supreme court on appeal will reverse the decree and remand the suit with directions to dismiss it. The supervisory jurisdiction does not attach in such a case. *Stickney v. Will*, 23 Wal. 150.

46. The jurisdiction of the supreme court for the review of the decisions of the circuit courts was not affected by the act of March 3, 1875 (18 Sts. 470), giving the circuit courts cognizance of suits arising under the constitution and laws of the United States, where the matter in dispute exceeds five hundred dollars. To give the right of review, five thousand dollars must be involved. *Whitsit v. Railroad Co.*, 103 U. S. 770.

47. Section 17 of the patent act of July 4, 1836 (5 Sts. 124), allowing writs of error and appeals where the courts "deem it reasonable" to allow them, without regard to the sum in controversy, does not extend to suits in equity to set aside an assignment of a patent. *Wilson v. Sandford*, 10 How. 99.

48. Jurisdiction in error cannot be had thereunder to review a question of costs to an amount less than two thousand dollars, costs in patent causes depending on the same laws which govern in other cases. *Sizer v. Many*, 16 How. 98.

49. The supreme court has no appellate jurisdiction of a suit to enforce a contract for the use of a patented invention, where the sum in controversy is not up to the ordinary jurisdictional requirement. *Brown v. Shannon*, 20 How. 55.

50. The right of appeal without regard to the sum in controversy in questions arising under federal laws granting to authors or inventors exclusive rights, which was conferred by the act of February 18, 1861 (12 Sts. 130), applies to controversies between a patentee and an alleged infringer, as well as to controversies between rival patentees; and the act of July 20, 1870 (16 Sts. 207), does not vary that right. *Philip v. Nock*, 13 Wal. 185.

51. The act of May 31, 1844 (5 Sts. 658), authorizing a writ of error without regard to the amount in controversy, is limited to suits brought by the government for violation of the revenue laws, and does not extend to suits against a collector for duties imposed and paid in excess of what the law justifies. *Mason v. Gamble*, 21 How. 390.

52. And it applies only where the judgment is rendered in a circuit court, and not in cases from a territorial court of appeals. *United States v. Carr*, 8 How. 1.

53. The act of March 3, 1845 (5 Sts. 736), affecting the revenue of the post-office depart-



**SUPREME COURT — JURISDICTION — continued.**

ment, is a "revenue law," within the meaning of the act of May 31, 1844 (5 Sts. 658), giving appellate jurisdiction in revenue cases without regard to the amount in dispute. *United States v. Bromley*, 12 How. 38.

54. An action by the United States, to recover the proceeds of sales of tobacco which, found in the hands of the defendant, a bailee, was seized as forfeited for the non-payment of the tax due thereon, and then left with him, under an agreement that he should sell the tobacco and hold the proceeds, subject to the decision of the proper court, is an action to enforce a revenue law, within the meaning of Rev. Sts. § 699, and the supreme court has jurisdiction of a writ of error therein, without regard to the amount involved. *Pettigrew v. United States*, 97 U. S. 385.

55. — *Appellate Jurisdiction to District Court — When the Court has Circuit Court Jurisdiction — In Bankruptcy — In California Land Cases.*] Where a district court having circuit court jurisdiction decides a cause which, if decided in a circuit court, either in an original suit or on appeal, would be subject to a writ of error from the supreme court, the judgment of the district court, under the judiciary act of 1789, § 10 (1 Sts. 77), is in like manner subject to such writ of error. *Durousseau v. United States*, 6 Cranch, 307.

56. The supreme court has jurisdiction by writ of error of proceedings on a *caveat*, filed in, or removed to the district court of the United States for Kentucky. *Wilson v. Mason*, 1 Cranch, 45.

57. No appeal lies to the supreme court from the decree of a district court in bankruptcy, and it makes no difference that for the time being there is no circuit court for the district. *Crawford v. Points*, 13 How. 11.

58. Under the act of March 3, 1851 (9 Sts. 632), concerning private land claims in California, there may be an appeal to the supreme court from a decree of the district court confirming or rejecting the claim, and another, after the case has been remanded, from a decree ascertaining the boundaries. *United States v. Fossatt*, 21 How. 445.

59. But the subsequent decree must be conclusive as to the boundaries, or it will not be so final as to admit of an appeal; and it is not conclusive where only three sides of the grant are given, and the survey necessary to ascertain the other has not been made. *Ib.*

60. — *Appellate Jurisdiction to Courts of the District of Columbia — Circuit Court — Supreme Court.*] Under the act of February 27, 1801, § 8 (2 Sts. 106), the supreme court has jurisdiction in error to the circuit court for the District of Columbia, notwithstanding the legislature of Virginia assumed to take away all right of appeal in certain cases. *Young v. Alexandria Bank*, 4 Cranch, 334.

61. An appeal lies from an order of that court quashing an inquisition in the nature of a writ

**SUPREME COURT — JURISDICTION — continued.**  
of *ad quod damnum*. *Cutiss v. Georgetown & Alexandria Turnpike Co.*, 6 Cranch, 233.

62. The supreme court has no jurisdiction of a writ of error to that court in a criminal case. *United States v. More*, 3 Cranch, 159.

63. Nor, where the sum awarded is less than a hundred dollars, although a greater sum were originally claimed. *Wise v. Columbian Turnpike Co.*, 7 Cranch, 276.

64. On a judgment of ouster on a writ of *quo warranto*, the sum in controversy is sufficient to sustain the jurisdiction on error in the supreme court where the salary of the office in question is a thousand dollars per annum, although it is paid in monthly instalments. *United States v. Addison*, 22 How. 174.

65. The act of April 2, 1816 (3 Sts. 261), does not deprive the supreme court of jurisdiction in error to that court, sued out by the plaintiffs in a petition for freedom, although their cause of action be not susceptible of a pecuniary estimate. *Lee v. Lee*, 8 Pet. 44.

66. That provision of the act of 1816 giving the supreme court appellate jurisdiction over that court without regard to the sum in dispute where questions of law of "such extensive interest and operation as to render the final decision of them by the supreme court desirable" are involved, held not to apply where the question was as to the construction of a statute providing that every bequest of personal estate to the wife should be construed as in bar of her share of the personal estate, unless otherwise expressed. *Campbell v. Read*, 2 Wal. 198.

67. The jurisdiction of the supreme court, on error to the supreme court of the District of Columbia, is regulated by the act of February 27, 1801 (2 Sts. 103), creating the district; error lies, therefore, in proceedings for damages occasioned to property by a street within the district, although the proceedings were governed by a Maryland statute, which allows an appeal or writ of error. *Baltimore & Potomac Railroad Co. v. Church*, 19 Wal. 62.

68. Under the act of March 3, 1863 (12 Sts. 763), the supreme court has jurisdiction in error to that court only where there has been a final judgment, order, or decree thereof. *Brown v. Wiley*, 4 Wal. 165.

69. An order of that court certifying the finding of a jury on an issue from the orphans' court is not such a final judgment; nor is an order overruling a motion for a new trial on exceptions taken at the trial of the issue. *Ib.*

70. Error does not lie from the supreme court to the district court of the District of Columbia, but from the supreme court of the district from which the case may afterwards be brought up to the supreme court. *Garnett v. United States*, 11 Wal. 256.

71. Under the act of February 25, 1879 (20 Sts. 320), giving the supreme court jurisdiction to review judgments of the supreme court of the

**SUPREME COURT — JURISDICTION — continued.**

District of Columbia only where the matter in dispute exceeds two thousand five hundred dollars, a writ of error to review a judgment for a less amount, pending under Rev. Sts. § 847, relating to the district, must be dismissed, the act containing no saving clause. *Baltimore & Potomac Railroad Co. v. Grant*, 98 U. S. 398.

72. The rule is the same where the case is brought up under section 848. *Dennison v. Alexander*, 103 U. S. 522.

73. The value of the "matter in dispute" is determined by the amount of the judgment rendered below, irrespective of interest or costs. *Baltimore & Potomac Railroad Co. v. Trook*, 100 U. S. 112.

74. — *Appellate Jurisdiction to Court of Claims.* No appeal lies to the supreme court from a decision of the court of claims. [MILLER and FIELD, JJ., dissenting.] *Gordon v. United States*, 2 Wal. 561. But see *infra*.

75. The right of appeal under the act of March 3, 1863 (12 Sts. 765), concerning the court of claims, which confers the right in cases involving more than three thousand dollars, is to be exercised by the party at his own volition, and independently of any discretion of the court. *United States v. Adams*, 6 Wal. 101; *United States v. Johnson*, Id.

76. Under that act an appeal would seem to lie on behalf of the United States, without regard to the amount in controversy, in a case involving the right of a claimant to a military bounty land-warrant under the acts of 1855 and 1856 (the claim having been rejected by the commissioner of the general land office and by the secretary of the interior), as being in a case judgment in which will affect a class of cases or furnish a precedent therein for an executive department. *United States v. Alire*, 6 Wal. 573.

77. Under Rev. Sts. § 707, giving the United States the right of appeal from a judgment of the court of claims where that court is by any law, general or special, required to take jurisdiction and act judicially in its determination, an appeal lies where a claim is by act of congress referred to the court with all papers, etc., with full jurisdiction to adjust and settle the same, there being no provision to the contrary. The right of appeal, although not expressly given, may be inferred from the general character and particular provisions of the act. *Vigo's Case*, 21 Wal. 648.

78. A decision of the court of claims awarding a new trial on motion of the government, under Rev. Sts. § 1088, while a claim "is pending before it, or on appeal from it, or within two years next after the final disposition" of the claim, cannot be reviewed by the supreme court. *Young v. United States*, 95 U. S. 641.

79. — *Appellate Jurisdiction to Territorial Courts.* A writ of error does not lie from the supreme court to a territorial court except by act of congress. *Clarke v. Bazadone*, 1 Cranch, 212.

80. A writ of error does not lie to bring up

**SUPREME COURT — JURISDICTION — continued.**

the record of a territorial court which has gone out of existence through the admission of the state into the Union. *Hunt v. Palao*, 4 How. 589. But otherwise by statute.

81. The supreme court can have no appellate jurisdiction of a suit brought in a territorial court to prevent the obstruction of a street, before any title in the land can have been acquired under any act of congress, as the amount in controversy cannot be sufficient in such case to satisfy the statute. *Lounsdale v. Parrish*, 21 How. 290.

82. The supreme court has jurisdiction to review the decision of a territorial court in a suit concerning a mining claim, although the land may not have been surveyed and brought into the market, such claims, as apart from rights in the soil, having the implied sanction of the government, and being capable of pecuniary valuation. *Sparrow v. Strong*, 3 Wal. 97.

83. The supreme court has no power to re-examine the action of a territorial court in refusing to set aside a judgment by default. *McAllister v. Kuhn*, 96 U. S. 87.

84. Under the act of March 26, 1804, § 8 (2 Sts. 285), the supreme court had appellate jurisdiction by writ of error to the district court of the territory of Orleans. *Morgan v. Callender*, 4 Cranch, 370; *Durousseau v. United States*, 6 Cranch, 307.

85. The act of February 22, 1847 (9 Sts. 128), gave the supreme court jurisdiction in error and by appeal in all cases originated in the territorial courts of Florida of the class described in section 8, whatever the amount, and whether civil or criminal. *Forsyth v. United States*, 9 How. 571; *Simpson v. United States*, Id. 578; *Cotton v. United States*, Id. 579.

86. Under Rev. Sts. § 702, the supreme court can review the final judgments of the supreme court of Washington territory in criminal cases only when the constitution or a statute or treaty of the United States is drawn in question. *Watts v. Washington Territory*, 91 U. S. 580.

87. The supreme court may entertain an appeal from a judgment of the supreme court of Utah which reverses a judgment of a district court on appeal because the evidence does not sustain the findings, and, after stating the facts, all the evidence being brought up, renders the judgment which should have been rendered below. *Stringfellow v. Cain*, 99 U. S. 610.

88. So of a judgment affirming the judgment of the district court, where that court has found the facts. The findings are, by the judgment, adopted for the purposes of the appeal. *Cannon v. Pratt*, 99 U. S. 619.

89. But otherwise where the only exception to the findings of the district court was that they were contrary to the evidence, and the judgment of the supreme court merely sets aside the findings and disposes of the case on the evidence without making a statement of the facts in the nature of a special verdict, as required by the act

**SUPREME COURT — JURISDICTION** — *continued*.  
of April 7, 1874 (18 Sts. 27). In such case there is nothing to re-examine. *Gray v. Howe*, 108 U. S. 12.

90. Where in no event can the value of the subject-matter exceed a thousand dollars, the supreme court cannot review the judgment of the Wyoming supreme court. *Nagle v. Rutledge*, 100 U. S. 675.

91. Under Rev. Sta. §§ 702, 1909, final judgments and decrees rendered by the supreme court of Wyoming may be reviewed only when the amount in controversy exceeds a thousand dollars, or the judgment is on a writ of *habeas corpus*, involving a question of personal freedom. No exception is made in favor of the United States, *United States v. Union Pacific Railroad Co.*, 105 U. S. 263.

*Allowance of Appeal alone does not give Jurisdiction where Review should be on Error or Certificate of Division.*

See APPEAL AND ERROR — JURISDICTION, 48.

*Appellate Jurisdiction in Confiscation Proceedings.*

See CONFISCATION, 53.

*Appellate Jurisdiction — Power of Congress to regulate.*

See CONGRESS, 9, 10.

*Cases Certified — What necessary to Jurisdiction.*

See CASES CERTIFIED.

*Certificate of Division from the District of Columbia — No Jurisdiction.*

See CASES CERTIFIED, 28.

*Certificate of Division — Jurisdiction on.*

See APPEAL AND ERROR — JURISDICTION, 8.

*Certiorari — Jurisdiction to issue.*

See CERTIORARI.

*Consent as affecting.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 205.

*Error to State Court — Jurisdiction.*

See ERROR TO STATE COURT — JURISDICTION.

*Error to State Court — How Jurisdiction must appear, etc.*

See ERROR TO STATE COURT — PROCEEDINGS ABOVE.

*Habeas Corpus — Power to award — Appellate Jurisdiction.*

See HABEAS CORPUS, 12 *et seq.*

*Habeas Corpus — Power of Single Judge to issue in Vacation, etc.*

See HABEAS CORPUS, 32, 33.

*Injunction — Power to issue.*

See INJUNCTION, 5.

*Mandamus — Power to issue — Appellate Jurisdiction when Original is wanting.*

See MANDAMUS, 9 *et seq.*

**SUPREME COURT — JURISDICTION** — *continued*.

*Prohibition — Power to issue.*

See PROHIBITION.

*Record — What it must show to give Jurisdiction in Error to State Court.*

See ERROR TO STATE COURT — BRINGING AND PERFECTING, 16 *et seq.*

*Revision of Judgment of Circuit Court of Louisiana in Action at Law.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 389.

*Review of Causes removed from State Courts.*

See REMOVAL OF CAUSES, 93 *et seq.*

*States — Suits by and against.*

See STATES — SUITS.

*Suit by Indian Tribe against a State — No Jurisdiction.*

See INDIANS, 1.

*Suit to which a State is a Party — Jurisdiction not necessarily exclusive.*

See REMOVAL OF CAUSES, 3.

**SUPREME COURT — PRACTICE** — *Process* —

*Reference for Further Proof — Stipulation — Submission of Cause.*

See pl. 1-6.

*Advancing Cause for Argument — Grounds — What Causes advanced.*

See pl. 7-18.

*Questions which the Court will hear — On which it will indicate an Opinion — What may be heard on Motion — Notice of Motion.*

See pl. 19-32.

*Holding Cause for Advisement — Rehearing — Review — Costs.*

See pl. 33-42.

1. — *Process — Reference for Further Proof — Stipulation — Submission of Cause.*

Where a case is properly in the supreme court no appeal, the court may issue any writ which may be necessary to render its appellate jurisdiction effective. *Ex parte Milwaukee & Minnesota Railroad Co.*, 5 Wal. 188.

2. The supreme court has power to issue process of subpoena in a suit by one state against another. *New Jersey v. New York*, 3 Pet. 461; *New Jersey v. New York*, 5 Pet. 234; *Rhode Island v. Massachusetts*, 7 Pet. 651; *Florida v. Georgia*, 11 How. 293.

3. Where the supreme court has original jurisdiction in equity, it may, in the exercise thereof, refer the cause to commissioners for the taking of further proof. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 9 How. 647.

4. Stipulations between counsel, relative to the course of proceeding in a cause pending in the supreme court, cannot be withdrawn by either party without the consent of the other or leave granted for cause shown, — as, for instance, a stipulation to submit the cause on printed arguments during the first ninety days of the term. *Muller v. Dows*, 94 U. S. 277.

**SUPREME COURT — PRACTICE — continued.**

5. Where counsel stipulate in writing to submit a case to the supreme court under rule twenty, and the case is submitted accordingly by one party after the time within which, under the stipulation, the other should have filed his reply, the court will take the case as submitted. *Aurrecochea v. Bangs*, 110 U. S. 217.

6. The supreme court will not accept the submission of a cause against the wishes of parties to similar suits depending on the decision of that before the court, where the defendants in all contributed to a common fund to enable the defence to be presented, and the submission is made because the parties to the suit before the court have come to an amicable understanding. *St. Louis Smelting & Refining Co. v. Kemp*, 103 U. S. 666.

7. — *Advancing Cause for Argument — Grounds — What Causes advanced.*] The fact that questions involved in a case are of public importance does not necessarily entitle it to be heard out of its order on the docket of the supreme court. *Poindezter v. Greenhow*, 109 U. S. 63.

8. The supreme court will not, in preference to cases pending between private parties, set down for argument a case in which the execution of the revenue laws of a state has been enjoined, unless it sufficiently appears that the operations of the state government will be embarrassed by delay. *Hoge v. Richmond & Danville Railroad Co.*, 93 U. S. 1.

9. A case will not be taken up out of its order on the docket unless delay in deciding it will embarrass the operations of the government. *United States v. Fossatt*, 21 How. 445.

10. A motion to advance a cause under a rule which, like the thirtieth rule, provides that criminal cases may be advanced by leave of court, is addressed to the discretion of the court. *Ward v. Maryland*, 12 Wal. 163.

11. A motion in behalf of the government to advance a criminal cause on the docket must state facts showing that the administration of government affairs will be embarrassed by delay. *United States v. Norton*, 91 U. S. 558.

12. Where a petition for a writ of error to a state court was made by a prisoner under sentence of death within a very few days of the date fixed for execution, the motion for allowance was permitted to be argued at the earliest motion day before the full bench. *Twitchell v. Pennsylvania*, 7 Wal. 321.

13. A suit against a tax-collector for alleged wrongs perpetrated while engaged in collecting state taxes, is not entitled to be heard out of its order on the docket as a suit to which a state is a party, under Rev. Sts. § 949. *Poindezter v. Greenhow*, 109 U. S. 63.

14. A case having been placed at the foot of the calendar under the rules, the court refused to assign a day for the argument, where to do so might prejudice other cases of public importance. *Barry v. Mercien*, 4 How. 574.

**SUPREME COURT — PRACTICE — continued.**

15. A case cannot be advanced for argument merely because the court is of opinion that the case was brought up for delay. *Amory v. Amory*, 91 U. S. 356.

16. A cause, presenting no question entitling it to precedence, will not be advanced on the docket that it may be heard with another standing before it, a party objecting thereto. *Louisiana v. New Orleans*, 103 U. S. 521.

17. The supreme court, while refusing to issue a writ of mandamus to compel the circuit court to make a decree restoring to a railroad company possession of a cañon, consented to hear a motion to advance the cause on the docket, as before the appeal from the decree as entered could be heard in the usual course of business, the company, by failing to complete its road, would forfeit rights and privileges granted by an act of congress. *Ex parte Denver & Rio Grande Railroad Co.*, 101 U. S. 711.

18. Rule thirty-two applies only to cases remanded to a state court by the circuit court, or dismissed under the removal act of March 3, 1875, § 5 (18 Sts. 470); and hence a cause pending on appeal from a decree on the merits in the circuit court may not be advanced under that rule. *Call v. Palmer*, 106 U. S. 39.

19. — *Questions which the Court will hear — On which it will indicate an Opinion — What may be heard on Motion — Notice of Motion.*] The court refused to take up a case involving constitutional questions, the office of one of the judges being vacant. *New York v. Miln*, 9 Pet. 85.

20. The supreme court will not hear a criminal case in error unless the plaintiff in error is where he can be made to respond to any judgment that may be rendered. *Smith v. United States*, 94 U. S. 97.

21. The supreme court will not pass on an abstract question the object of which is to obtain a decision touching the constitutionality of a state statute, but will dismiss the bill without prejudice, where it shows no equity in the complainant, and contains no averment that he has been injured by the statute. *Williams v. Hagood*, 98 U. S. 72.

22. The court will not hear a case which has become a mere moot case, — as, for instance, the marshal having executed the order of the circuit court to return a person to China, the order will not be reviewed. *Cheong Ah Moy v. United States*, 113 U. S. 216.

23. So where, pending a writ of error to review a judgment for the plaintiff against a county on bonds, the case has been settled by giving new bonds in place of the old ones surrendered. *Dakota County v. Glidden*, 113 U. S. 222.

24. And the court will receive evidence *dehors* the record to show that the case has been settled. *Id.*

25. The supreme court will not pronounce an opinion on a question not raised by the record, although the counsel on both sides desire. *Brad-*

**SUPREME COURT — PRACTICE — continued.**

*street v. Potter*, 16 Pet. 317; *Mills v. Brown*, Id. 525.

26. Where from the record it appears probable that the omission of the statements necessary to show jurisdiction in the circuit court was caused by inadvertence, and may be supplied for a future trial in that court, the supreme court, for the benefit of parties, may indicate its conclusion on the merits. *Grace v. American Central Insurance Co.*, 109 U. S. 278; *Mansfield Coldwater, & Lake Michigan Railway Co. v. Swan*, 111 U. S. 379.

27. The court will never anticipate a question of constitutional law in advance of the necessity for deciding it; nor will it ever formulate a rule of constitutional law broader than the precise facts to which it is to be applied require. *Liverpool. New York, & Philadelphia Steamship Co. v. Emigration Commissioners*, 113 U. S. 33.

28. In the supreme court, the bar to a writ of error under a statute of limitations being apparent of record, may be taken advantage of by motion. *Brooks v. Norris*, 11 How. 204.

29. Where the board of liquidation of the debt of a city appeared in the supreme court and resisted the entry of an order asked pursuant to a stipulation agreed to by the city council, on the ground that, pending the appeal, authority over the subject-matter of the controversy had been transferred from the council to the board, it was held that the board should be permitted to show cause for resisting the entry of the order, the dispute as to the authority of the council presenting questions too important to be settled summarily on motion. *New Orleans v. New Orleans, Mobile, & Texas Railroad Co.*, 108 U. S. 15.

30. Usually, where a party desires to file an original bill in the supreme court, the court will hear a motion for leave to do so; but this motion, in general, is heard only on the part of the plaintiff. *Georgia v. Grant*, 6 Wal. 241.

31. Notice of a motion to dismiss may be deemed sufficient, although a copy of the brief or argument to support it was not filed as required by the rule, where a full argument has been had on the merits of the motion. *Thomas v. Woolbridge*, 23 Wal. 233.

32. A notice of a motion which designates no time for the hearing thereon is insufficient and irregular, especially where it is apparent that the counsel to whom the notice was given had reason to suppose that further information would be given him as to the time when the motion would be called up. *Glenny v. Langdon*, 94 U. S. 604.

33. — *Holding Cause for Advisement — Rehearing — Review — Costs.* Reasons for which the supreme court will hold a cause under advisement. *Soulard v. United States*, 4 Pet. 511.

34. The supreme court will not rehear a cause after the term at which it was decided. *Hudson v. Guestier*, 7 Cranch, 1; *Washington Bridge Co. v. Stewart*, 3 How. 413; *Peck v. Sanderson*, 18 How. 42.

**SUPREME COURT — PRACTICE — continued.**

35. The supreme court will not grant a rehearing, after it has remitted the cause to the court below that its decree may be carried into effect. *Browder v. McArthur*, 7 Wheat. 58.

36. A reargument will be directed where a constitutional question is involved, unless a majority of the whole court concur in an opinion. *Briscoe v. Kentucky Bank*, 8 Pet. 118; *New York v. Miln*, Id. 120.

37. The supreme court will order a reargument after a decision has been made, only when some member of the court who concurred in the judgment desires it, and then on its own motion; and it makes no difference that the decision was by a divided court. *Brown v. Aspden*, 14 How. 25. And see *United States v. Knight*, 1 Black, 488.

38. The supreme court will not rehear a case on the ground that the original hearing was had on an imperfect record, where it is apparent that the matters omitted do not affect the merits of the case, or only go to establish facts before deemed fully proved. *Ambler v. Whipple*, 23 Wal. 278.

39. Where counsel desire a rehearing, and the court do not order one of its own motion, they may submit, without argument, a brief written or printed petition, suggesting the point or points which they think important; when, if any judge who concurred in the decision move for a rehearing, the motion will be considered, but otherwise denied as of course. *St. Louis Public Schools v. Walker*, 9 Wal. 603.

40. A petition for a rehearing in the supreme court cannot be filed after the term at which the judgment was rendered. *Brooks v. Burlington & Southwestern Railway Co.*, 102 U. S. 107.

41. The supreme court has no power to review its own decisions. *Washington Bridge Co. v. Stewart*, 3 How. 413.

42. In cases of original jurisdiction, the supreme court has the power inherent in all courts to award costs to the proper party and render judgment therefor, independently of any special act of congress. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 460.

*Admiralty — Examination of New Witnesses on Appeal — When permitted.*

See ADMIRALTY — PRACTICE, 85.

*Admiralty — Grant of Commission to take New Evidence.*

See ADMIRALTY — PRACTICE, 84.

*Affirmance — For what the Court will affirm — Where the Court is divided — No Sufficient Assignment of Error.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 467 et seq.

*Affirmance of Judgment in Moot Case.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 471, 472.

*Affirmance — When the Court will affirm on Appeal or Error nunc pro tunc.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 473.

**SUPREME COURT — PRACTICE — continued.**

*Amendment allowed on Appeal or Error.*

See **APPEAL AND ERROR — PROCEEDINGS** ABOVE, 25, 26.

*Amendment — Court may not allow Amendment after Reversal for Want of Jurisdiction for Want of Citizenship.*

See **APPEAL AND ERROR — PROCEEDINGS ON MANDATES**, 16.

*Amendment of Record on Appeal by inserting a Final Decree founding the Jurisdiction below.*

See **APPEAL AND ERROR — PROCEEDINGS** ABOVE, 487, 488.

*Amendment of Writ of Error.*

See **ERROR — BRINGING AND PERFECTING**, 72.

*California Land Claims — Mexican Grants — Appeals.*

See **LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS**, 335 *et seq.*

*Continuance — For what the Court will continue a Cause on Appeal from the Court of Claims.*

See **APPEAL FROM COURT OF CLAIMS**, 16.

*Continuance — On Appeal.*

See **APPEAL AND ERROR — PROCEEDINGS** ABOVE, 63.

*Costs, in Supreme Court, in general.*

See **COSTS**.

*Damages, etc., for Delay — Allowance on Affirmance on Appeal or Error.*

See **APPEAL AND ERROR — PROCEEDINGS** ABOVE, 519 *et seq.*

*Depositions to be taken under Commission — Not de bene esse.*

See **DEPOSITION**, 8.

*Discontinuance — Practice in Matters of.*

See **DISCONTINUANCE**.

*Dismissal — Clerk's Fees — Non-payment Ground for Dismissal of Appeal.*

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*Error to State Court — Issue of Writ — To what Court, etc.*

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*Hearing — What is open, and who may be heard on Error to State Court.*

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*Hearing — What is open — Jurisdiction in Admiralty open to Argument although not raised below.*

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*Hearing — What is open — The Entire Record — Nothing not in the Record — Objections not properly made — Objections waived — Favorable Rulings and Harmless Errors.*

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*Hearing — What is open — Objections to Master's or Referee's Report, etc., not made below, not open.*

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*Hearing — What is open — Jurisdiction of the Circuit Court.*

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*Hearing — What is open — Whether under Rev. Sts. § 914, the Court may review an Action in which the Facts are found by a Referee.*

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*Hearing — What is open on Appeal from Court of Claims — Items rejected below.*

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*Hearing — Time allowed on Appeal, especially in the Admiralty, to show that Sum necessary to the Jurisdiction is in Demand.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 24.

*Hearing — Who may be heard on Appeal or Error — Persons not Parties — Parties who do not appeal.*

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*Judgment — Court will not review Judgment rendered on Former Writ of Error in Same Case.*

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*Pleadings — Writs of Error — Appeals, etc. — When amended.*

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*Prize — New Claim in Prize Cause not received.*

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*Record — Certificate of Presiding Judge will help out the Record on Error to State Court.*

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*Rehearings — English Chancery Rules concerning, inapplicable on Appeal.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 541.

*Reinstatement — When the Court will permit the Reinstatement of an Appeal or a Writ of Error.*

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*Remand — When the Court will remand a Cause for the making of Proper Parties.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 512 *et seq.*

*Remand — When the Court will remand for Further Proceedings — Venire de novo — Amendment — Parties.*

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*Remand — When the Court will remand Cause for an Amendment.*

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*Remission of the Record on Appeal in Equity to Circuit Court for Rehearing.*

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*Reversal — For what the Court will not reverse — Matters of Discretion — Objections waived — Immaterial and Harmless Errors, etc.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 427 *et seq.*

*Reversal — For what the Court will reverse on Appeal from the Court of Claims.*

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*Reversal — For what the Court will reverse on Error.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 494 *et seq.*

*Reversal — For what the Court will reverse — Want of Jurisdiction below — Expiration or Change of Law pending Appeal — Error in Rulings — Matters of Discretion.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 409 *et seq.*

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*Reversal in Admiralty — Errors merely technical.*

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*Reversal where Court on Error was equally divided as to Jurisdiction below.*

See **APPEAL AND ERROR — PROCEEDINGS** ABOVE, 494.

*Revival of Action.*

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*Security — Further Security on Appeal or Error — When required.*

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*Supersedeas — Court may issue, where the Court below proceeds notwithstanding Writ of Error.*

See **ERROR — BRINGING AND PERFECTING**, 53; but see 54.

*Supersedeas — When awarded — How enforced — When vacated or modified.*

See **APPEAL AND ERROR — PROCEEDINGS** ABOVE, 66 *et seq.*

**SUPREME COURT OF THE DISTRICT OF COLUMBIA — Powers in Patent Cases — To issue Mandamus — Over Appeals — Conclusiveness of Judgments.]** The powers of the supreme court of the District of Columbia in patent cases are the same as those of the circuit courts. *Cochrane v. Deener*, 94 U. S. 780.

2. The supreme court of the District of Columbia, as organized by the act of March 3, 1863 (12 Sts. 762), is a different court from the criminal court as fixed by the same act, although the latter court is held by a judge of the former; and hence the former court has no power to disbar an attorney for contempt of the latter. *Ex parte Bradley*, 7 Wal. 364; *Bradley v. Fisher*, 13 Wal. 335.

3. Nor, for the same reason, will an order of the criminal court, striking the name of an attorney from the roll of that court, remove the attorney from the bar of the supreme court. *Bradley v. Fisher*, 13 Wal. 335.

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4. The act of June 21, 1870 (16 Sts. 160), which took away the independent character of the criminal court and declared that its orders, etc., should be deemed those of the supreme court, although it may have enlarged the operation of such an order, did not render it, as the act of the judge who made it, an order of removal from the bar of any other than the criminal court. *Ib.*

5. The supreme court of the District of Columbia has jurisdiction to issue a writ of mandamus in a case where, under the common law, the writ might issue. Nothing in the revision of the statutes affects the case, and the act of February 27, 1877 (19 Sts. 253), amending Rev. Sts. § 763, and conferring jurisdiction on the courts of the district, clearly warrants the exercise of the jurisdiction. *United States v. Schurz*, 102 U. S. 378.

6. The power of a justice of the supreme court of the District of Columbia over an appeal from the judgment of that court and over the security, is exhausted, in the absence of fraud, when he takes the security and signs the citation. The control of the *supersedeas* and the appeal is then transferred to the appellate court, and the justice of the former court is without power to execute its decree because of the failure of the appellant to file an additional bond as ordered, on the ground that the bond approved was insufficient. *Draper v. Davis*, 102 U. S. 370.

7. The supreme court of the District of Columbia is a court of the United States, and a judgment thereof, when put in suit in a state, is conclusive on the defendant, except for such cause as would be sufficient to set it aside in the courts of the district. *Embry v. Palmer*, 107 U. S. 3.

**SURETYSHIP — Surety — Who are Sureties — Rights and Remedies, in general.**

See pl. 1-7.

**Surety — Discharge — How discharged — Forbearance — Collateral Security, etc.**

See pl. 8-19.

1. — **Surety — Who are Sureties — Rights and Remedies, in general.]** An indorser of a promissory note, although an indorser for the maker's accommodation, is not a "person bound as security" within the meaning of the Arkansas statute which permits such a person, after a right of action has accrued, to require the party having it to commence suit against the principal debtor, under penalty of the exoneration of the security. *Ross v. Jones*, 22 Wal. 576.

2. Where a surety in an official bond has paid the amount of the penalty under judgments thereon, he is liable for nothing more. *Leggett v. Humphreys*, 21 How. 66.

3. Hence, where, pending an appeal from a judgment on such a bond, the surety is sued



**SURETYSHIP — continued.**

in another court and compelled to pay the full penalty, such payment will be a good defence to the first action where the judgment is reversed and the cause sent back for a new trial. *Ib.*

4. If the surety use due diligence to avail himself of such defence there by proper plea, but be refused leave to plead it, he may come into equity for relief, and the judgment will be enjoined. *Ib.*

5. And in the circumstances of this case it was held not to affect his right to relief in equity that the principal had put in his hands the means of indemnity for the payment so made. *Ib.*

6. If the surety of a surety pay the debt assured, he may maintain assumpsit against the principal for money paid. *Hall v. Smith*, 5 How. 96.

7. In the absence of fraud, accident, or mistake, equity will not give a remedy against the personal assets of a deceased surety in a joint and several bond, where the obligee has lost his remedy at law by electing to take a joint judgment thereon. [*McLEAN and WOODBURY, JJ., dissenting.*] *United States v. Price*, 9 How. 83.

8. — *Surety — Discharge — How discharged — Forbearance — Collateral Security, etc.* The taking of collateral security without suspending the original cause of action will not discharge a surety. *United States v. Nicholl*, 12 Wheat. 505.

9. Nor will a mere proposition to give time on conditions not complied with. *Ib.*

10. A resolution by the directors of a bank to suspend the cashier will not discharge his sureties. They will remain liable for any defaults he may commit at any time before actual removal. *McGill v. United States Bank*, 12 Wheat. 511.

11. Voluntary forbearance towards the principal debtor, which the creditor is at liberty, at any time, to terminate, will not discharge a surety. *Creath v. Sims*, 5 How. 192.

12. Taking a time mortgage from the principal debtor merely as a collateral security does not discharge the sureties, there being no agreement for a valuable consideration to give time generally. *United States v. Hodge*, 6 How. 279.

13. To an action against the clerk of a court on his official bond for taking an insufficient injunction bond, a plea that the plaintiff took the bond, put it in suit, and recovered a sum of money in satisfaction thereof, is a good bar; the clerk standing in the position of a mere surety for the original defendants, and of the last and most favored one besides, and so being discharged. *Bevins v. Ramsey*, 15 How. 179.

14. The sureties in a bond given to procure the release of partnership goods attached on mesne process against the firm, and conditioned for its production if judgment should be recovered against the defendants, are not discharged by a discontinuance as to part of the defendants for want of jurisdiction, if the suit be prosecuted to judgment against the administrator of the other

**SURETYSHIP — continued.**

defendant, the judgment being for the partnership debt and the goods being partnership property. *Inbusch v. Farwell*, 1 Black, 566.

15. An alteration of a bond by the erasure of the name of one of the principals, with the consent of the obligee but without that of the sureties, will discharge the sureties from all liability thereon. *Martin v. Thomas*, 24 How. 315.

16. Any unauthorized variation in the agreement of a surety that may prejudice him or substitute an agreement different from that which he entered into, discharges him. *Smith v. United States*, 2 Wal. 219.

17. Thus, where several sign as surety for a government officer in a bond which by statute must be approved by a judge before the officer enters on the duties of his office, an erasure of one of the names, although made before submission for approval, will avoid the bond as to another surety uninformed thereof who signed at the same time with the one whose name is erased, or afterwards. *Ib.*

18. A surety is not discharged by a contract between his principal and the obligee, which does not place him in a position different from that which he occupied before it was made. *Roach v. Summers*, 20 Wal. 165.

19. The liability of the sureties on a bond given by an insurance agent to his principals, conditioned to pay over, is not affected by the fact that the sureties were unaware that the agent was already in default, as he was, and that an agreement subsisted between him and his principals, under which commissions to be earned were pledged for the repayment of his indebtedness, the sureties having instituted no inquiries and no misstatements having been made to them. *Magee v. Manhattan Life Insurance Co.*, 92 U. S. 93.

*Appeal-bond in Louisiana — Summary Proceeding, etc.*

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*Appeal-bond — Measure of Liability of Surety.*

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*Bail-bond — Sureties in, in general.*

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*Discharge in Bankruptcy of Principal — Effect.*

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*Discharge of Surety by Interlineation of the Name of another.*

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*Indemnity as between Sureties — Subrogation of Creditor of Principal to their Rights — Surety in Bail-bond — Subrogation to Priority of United States.*

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*Insolvent Public Debtor* — Surety not discharged.

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*Negotiable Notes* — Sureties on.

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*Parties to Bill by Creditor to enforce Trust for Indemnity of Surety* — Surety and Trustee.

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*Public Debtor* — Right of Surety — Priority of Payment, etc.

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*Strict Construction not required in Collateral Matters.*

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*Lands* — *In general.*

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*Port Surveyor* — Right to Share of Penalties for Breach of Embargo and Non-intercourse Law.

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*Public Lands in North Carolina and Tennessee.*

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*Public Lands in Pennsylvania.*

See **LANDS OF STATES** — **PENNSYLVANIA**, 3 *et seq.*

*Public Lands* — Survey necessary to Confirmation of Title, under Grants from Spain and Mexico.

See **LANDS OF UNITED STATES** — **GRANTS FROM FORMER GOVERNMENTS**, 369 *et seq.*

*Public Lands in Texas.*

See **LANDS OF STATES** — **TEXAS**.

*Public Lands in Virginia and Kentucky.*

See **LANDS OF STATES** — **VIRGINIA AND KENTUCKY**.

*Public Lands* — Surveys, in general.

See **LANDS OF UNITED STATES** — **DISPOSAL**, 18 *et seq.*

*Vessel* — What Survey regular, etc.

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**SURVIVAL** — *Actions* — What Actions survive.

See **ACTION**.

**SWAMP LANDS** — *Assessment for Reclamation — Due Process of Law, etc.*] One whose land, in New Orleans, is subjected to an assessment for draining the swamps of the city, is not deprived of his property without due process of law, within the meaning of the constitution, when the statute requires that the assessment, before becoming effectual, must be submitted to a court of justice, with notice to the owners of property, all of whom have an opportunity to appear and contest it. *Davidson v. New Orleans*, 96 U. S. 97.

2. An assessment on land benefited by reclamation proceedings had under a statute which, like that of California, makes no provision for notice or hearing respecting the assessment, but which requires that it shall be enforced only by legal proceedings wherein any defence going either to the validity of the assessment or to its amount may be set up, does not deprive the owner of the land assessed of his property without due process of law. *Hagar v. Reclamation District*, 111 U. S. 701.

3. A state may provide that assessments on lands benefited by reclamation proceedings shall be collected in coin. *Id.*

4. A statute which, like the New Jersey statute of March 8, 1871, provides for assessing the expense of draining tracts of low, marshy, boggy, or wet lands on the several owners is constitutional, provision being made for notice and an opportunity for hearing. Owners assessed under such a statute are neither deprived of their property without due process of law, nor are they denied the equal protection of the laws. *Wurts v. Hoagland*, 114 U. S. 606.

*Grants to States* — *In general.*

See **LANDS OF UNITED STATES** — **LEGISLATIVE GRANTS**, 73 *et seq.*

*Power of States in Reclamation.*

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*Reclamation and Sale of Lands in California.*

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*Sale of Lands in Iowa.*

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*Selection* — *Federal Question.*

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## T.

**TAIL** — *Estates in* — *In general.*  
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**TAKING** — *What a "taking" of Property within the Meaning of the Constitution.*  
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*Direct Tax* — *In general* — *What constitutes, etc.*

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*Duty of Tonnage, in general* — *Particular Statutes.*

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*Internal Revenue Taxes, in general.*

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*Power to tax in general.*

See TAX — POWER.

**TAX — ASSESSMENT** — *In general* — *What necessary to Validity.*  
See pl. 1-9.

*Assessment and Equalization of Taxes on Railroad Property.*

See pl. 10-16.

1. — *In general* — *What necessary to Validity.*] In general, the states have the right to determine the manner of levying and collecting taxes on private property within their limits; and may declare that a tract of land shall be chargeable with taxes, whoever the owner and to whomsoever assessed, and that an erroneous assessment shall not vitiate a sale for taxes. *Wetherspoon v. Duncan*, 4 Wal. 210.

2. Although differing from proceedings in courts of justice, the general system of procedure for the levy and collection of taxes, in this country, is, due process of law within the meaning of the constitution. *Kelly v. Pittsburgh*, 104 U. S. 78.

3. A person is not deprived of his property without due process of law by the enforced collection of taxes, merely because they work hardship or impose unequal burdens. *Ib.*

**TAX — ASSESSMENT** — *continued.*

4. A statute does not deprive one of property without "due process of law," merely because it does not afford him an opportunity to be present when a tax is assessed against him, or provide that the tax shall be collected by suit; if he can have the collection of an illegal tax enjoined, he is adequately protected, although he is required to give security before an injunction can issue. *McMillen v. Anderson*, 95 U. S. 37.

5. If a bank claim that it is unlawfully taxed on legal-tender notes of the United States, it has the burden of proving the fact that it is so taxed. Unless affirmatively controverted, the decision of the assessor must stand. *New Orleans Canal & Banking Co. v. New Orleans*, 99 U. S. 97.

6. Proof that one has acted as an assessor of taxes, and that his return has been sanctioned by the proper officers of the corporation, is sufficient, without direct proof of appointment, to prove an authority to act in that capacity. *Ronkendorff v. Taylor*, 4 Pet. 349.

7. If the assessor be required by statute to take an oath of office, and to file his assessment and give notice thereof within a certain time, under severe penalties, a neglect to comply therewith will vitiate the assessment, and avoid a sale for the tax. *Parker v. Overman*, 18 How. 137.

8. In Illinois, a judgment for taxes which does not show the amount in money of the tax for which it was rendered is fatally defective; and mere numerals, without some mark indicating for what they stand, is insufficient. *Woods v. Freeman*, 1 Wal. 398.

9. Where the statute authorizes county auditors to issue compulsory process to bring before them for examination under oath persons suspected of making false returns, and requires that notice be given before an entry increasing an assessment is made, one who appears in response to a subpoena and is informed by the auditor of his purpose to increase the assessment, and who is afforded an opportunity for explanation, and who does not object to the notice, cannot be heard afterwards to object that the notice was not in writing. *Surges v. Carter*, 114 U. S. 511.

10. — *Assessment and Equalization of Taxes on Railroad Property.*] It is neither in conflict with that provision of the Illinois constitution which declares that taxation must be uniform, nor is it inequitable that the rolling-stock, track, capital stock, and franchise of railroad companies should be ascertained by the state board of equalization, and state, county, and city taxes collected within each municipality on such assessment, in the proportion which the length of the road within the municipality bears to the

**TAX — ASSESSMENT — continued.**

whole length of the road within the state. *Taylor v. Secor* [*State Railroad Tax Cases*], 92 U. S. 575.

11. The rule which considers the *situs* of the franchise, rolling-stock, etc., of a company to be at its principal place of business, is merely a rule based on the law of the state which recognizes it, and is, therefore, subject to legislative repeal. *Ib.*

12. It is no objection to the system that the track, etc., are not assessed in each county according to their value there, but according to the aggregate value in all the counties. *Ib.*

13. Nor that it provides for a valuation and assessment, although a company may be making no profits and paying no dividends. That is no reason why its tangible property should escape taxation, nor why its franchise may not be deemed to have an actual value. *Ib.*

14. Want of notice by a state board of equalization of an increase in the valuation of the property and franchises of railroad companies, affords to a company affected by such valuation no ground for contesting the validity of the tax. Such a company is not entitled to special notice, more than an individual. *Ib.*

15. Where an Illinois railroad corporation had leased a portion of its road to an Indiana corporation, which had been made an Illinois corporation also, and the state board of equalization had assessed the full value of the franchise and property of the lessor corporation as though no lease existed, and fixed the proportion to be distributed among the counties through which the leased road ran, distributing this amount among those counties and charging it against the lessee corporation, it was held that the mode thus adopted conformed substantially to the law of Illinois. *Indianapolis & St. Louis Railroad Co. v. Vance*, 96 U. S. 450.

16. A statute which provides a comprehensive scheme for assessing taxes on railroad property by a territorial board, which declares that all inconsistent legislation is repealed, and which, although not specially mentioning property in cities as falling within the scheme, does specially mention that in counties, must be deemed to supersede the provisions of a city charter whereunder railroad property located in the city has hitherto been assessed by the local officials. *Union Pacific Railway Co. v. Cheyenne*, 113 U. S. 516.

*Evidence of Assessment — Official Tax-books.*  
See EVIDENCE — DOCUMENTARY, 23.

*Levy — Circuit Court — Mandamus to compel Levy to pay Municipal Bonds not yet in Suit.*  
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*Levy — Mandamus to compel.*

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*Levy — Mandamus to compel Levy by Municipal Corporation to pay Judgment — Interest on Bonds — Contracts.*

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*Levy — Power of Court to compel.*

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**TAX — COLLECTION — Power and Duty of Collector.**

See pl. 1, 2.

*Sales for Taxes — What essential to Valid Sale — Advertisement and Notice — Sale of all or part of a Tract — Effect of Sale on Tax Lien — Proceedings after Sale — Sales in Washington.*

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*Deed — Effect of Deed as Evidence — How Objections to Deed may be taken.*

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*Remedies for Illegal Collection — Injunction — Action to recover back — When defeated by Voluntary Payment — When Right to tax may not be questioned.*

See pl. 52-64.

1. — *Power and Duty of Collector.*] Where a statute requires taxes collected to be paid in to the local treasury, and over to the treasury of the state, in coin, it follows that the collector is authorized to collect them in coin. *Lane County v. Oregon*, 7 Wal. 71.

2. A tax-collector, when called on to pay over money collected, has no right to refuse because he conceives that the tax was not rightly laid; and his duty is unaffected by the fact that he has not given the statutory bond requiring him to pay over. *Bell v. Mobile & Ohio Railroad Co.*, 4 Wal. 598.

3. — *Sales for Taxes — What essential to Valid Sale — Advertisement and Notice — Sale of all or part of a Tract — Effect of Sale on Tax Lien — Proceedings after Sale.*] To sup-

**TAX — COLLECTION — continued.**

port a tax sale it must appear that the law was strictly complied with. *Stead v. Course*, 4 Cranch, 403; *Parker v. Rule*, 9 Cranch, 64; *Thatcher v. Powell*, 6 Wheat. 119; *Ronkendorff v. Taylor*, 4 Pet. 349; *Parker v. Overman*, 18 How. 137.

4. Thus, if a tax-collector is authorized to sell only enough to pay the tax, and he sell an entire tract when a part would have been sufficient, the sale is void. *Stead v. Course*, 4 Cranch, 403.

5. In Tennessee, when land is sold on a summary proceeding for non-payment of taxes, it is necessary to the validity of the sale and of the deed that every fact essential to the jurisdiction should appear of record. *McClung v. Ross*, 5 Wheat. 116.

6. Thus, under the Tennessee statute of October 25, 1797, it should appear that the sheriff had returned that there were no goods and chattels of the delinquent proprietor out of which the tax could be made before the court made the order of sale. *Thatcher v. Powell*, 6 Wheat. 119.

7. It is essential to the validity of a tax sale that it be conducted not only in conformity with the requirements of the law, but with entire fairness and in perfect freedom from all influences likely to prevent competition. Thus, a sale will be declared invalid if the purchaser declare at the time of the sale that it will be of no use to bid, as the owner will redeem, and so prevent others from bidding against him. *Slater v. Maxwell*, 6 Wal. 268.

8. Inadequacy of price does not affect the validity of a tax sale. *Ib.*

9. If the land be not advertised according to law, the sale will be void. *Thatcher v. Powell*, 6 Wheat. 119.

10. The sale must not be advertised until the whole period allowed for payment has expired. *Ronkendorff v. Taylor*, 4 Pet. 349.

11. A law requiring notice by advertising once a week for three months is satisfied by publication on any one day in each week during that period, although the interval between some of the publications be more than seven days. *Ib.*

12. A notice of sale of land "for taxes due thereon up to" a certain year is sufficient under a law permitting a sale only when two years' taxes are due and unpaid. *Ib.*

13. In Ohio, a tax sale is void if the land be not sufficiently described; *e. g.*, if it be listed and advertised only as a certain number of acres in a certain section, without specifying in what part. *Raymond v. Longworth*, 14 How. 76.

14. Where the law provides that notice of a tax sale shall be published "once in each week for twelve successive weeks," the first notice must precede the sale by twelve full weeks, or eighty-four days, or the sale will be invalid. *Early v. Homans*, 16 How. 610.

15. A part of a lot may be sold for taxes, but if it be an undivided part, the published notice must so describe it. *Ronkendorff v. Taylor*, 4 Pet. 349.

**TAX — COLLECTION — continued.**

16. Where a tax was assessed on a whole fractional quarter-section, embracing several village lots, and the sale for non-payment was of an "acre off the east side," the sale was held void. *Ballance v. Forsyth*, 13 How. 18.

17. Where a tract of land sold for taxes consists of several distinct parcels, the sale of the entire tract, in one body, does not vitiate the proceeding, if bids could not be obtained on an offer of a part. *Slater v. Maxwell*, 6 Wal. 268.

18. That provision of the California statute which says that the sheriff in selling property on judgment against it for delinquent taxes shall sell only the smallest quantity which any purchaser will take and pay the judgment and costs, was intended for the protection of the taxpayer, and, like all such directions to officers as are for the protection of the citizen and his property, is not directory but mandatory. *French v. Edwards*, 13 Wal. 506.

19. In such case, therefore, if the deed of the sheriff recite a sale to "the highest bidder" and for "the largest sum bid for said property," it will be void on its face, and it cannot be aided by the ordinary presumptions, as presumptions are not indulged to sustain irregular proceedings where the irregularity is manifest. [MILLER, J., dissenting.] *Ib.*

20. A lien for taxes does not stand on the footing of an ordinary incumbrance; and, unless otherwise provided by statute, is not displaced by a sale of the property under a prior judgment. *Osterberg v. Union Trust Co.*, 93 U. S. 424.

21. Where the owner of land sold for taxes and bid in by the state, purchases the state bids before the state's title becomes absolute, the state's lien is merged in the title, and a subsequent conveyance from the state to such owner does not operate to transfer the title, but operates only as evidence that the taxes are satisfied and the lien therefor discharged. *Gould v. Day*, 94 U. S. 405.

22. A title to land in West Virginia founded on a tax sale made under the code of Virginia before the erection of West Virginia as a state, held void where it was not completed by a survey and deed as required by that code before the repeal by West Virginia of that part of the code which related to such sales. *Shutte v. Thompson*, 15 Wal. 151.

23. In Iowa, on a sale of land in a county for taxes, where the sales are properly continued from day to day, a sale made on some day to which the sale is adjourned will not be rendered invalid by being recorded as made on the first day of the sale. *Callanan v. Hurley*, 93 U. S. 387.

24. — *Tax Sales in Washington.* Under the act of May 4, 1812 (2 Sts. 727), amendatory of the charter of the city of Washington, a sale of unimproved lots in the city, for taxes, is illegal, unless they have been assessed to the true owner. *Washington v. Pratt*, 8 Wheat. 681.

**TAX — COLLECTION — continued.**

25. The lien on each lot for taxes is several and distinct, and the purchaser of each holds the lot purchased unincumbered by the taxes due on other lots held by his vendor. *Ib.*

26. The advertisement must contain a particular statement of the amount of taxes due on each lot separately. *Ib.*

27. If the sale of one or more lots produce the amount due on all the lots of the same proprietor, the city cannot sell further. *Ib.*

28. Under the act of May 26, 1824 (4 Sts. 75), amending the charter of Washington where several lots belonging to the same person are put up for sale for non-payment of the taxes, each lot cannot be sold for the tax due thereon, but only so many in all as will bring money enough to pay the entire sum due. *Mason v. Fearson*, 9 How. 248.

29. Under that act a sale may be valid, although the taxes were assessed and the lots advertised in the name of the deceased owner. *Holroyd v. Pumphrey*, 18 How. 69.

30. Nor is it essential to the validity of a sale of unimproved land for taxes that the owner's personal estate be first exhausted, even though the owner live in the city. *Thompson v. Carroll*, 22 How. 422.

31. Nor is the validity of such a sale affected by non-observance of an ordinance of the city directing the collecting officer to levy first on personal property, unless the owner consent in writing to a different order. *Ib.*

32. — *Deed — Effect of Deed as Evidence — How objections to Deed may be taken.* The marshal's deed of land sold for non-payment of direct taxes under the act of July 14, 1798 (1 Sts. 597), is not even *prima facie* evidence of compliance with the prerequisites of the law. *Williams v. Peyton*, 4 Wheat. 77. In Arkansas the rule is the same. *Pillow v. Roberts*, 13 How. 472; *Thomas v. Lawson*, 21 How. 331.

33. If a statute providing a proceeding for the confirmation of titles under tax sales declare that the deed shall be deemed sufficient evidence of the authority under which the sale is made, and of the description and price, the deed cannot be considered as conclusive of those facts, but as *prima facie* evidence thereof. *Parker v. Overman*, 18 How. 137.

34. A statute making a tax deed "*prima facie* evidence" of a valid title in the grantee, where the land is not redeemed within the time allowed by law, does not dispense with a performance of acts which the law prescribes on a sale for taxes, but merely devolves the burden of proof of non-performance upon him who attacks the sale. *Williams v. Kirtland*, 13 Wal. 306.

35. In Iowa, a treasurer's deed for lands sold for taxes, if substantially regular in form, is at least *prima facie* evidence that a sale was made; and, if there were a *bona fide* sale, in substance or in fact, the deed is conclusive evidence that it

**TAX — COLLECTION — continued.**

was made at the proper time and in the proper manner. *Callanan v. Hurley*, 93 U. S. 387.

36. Where a statute, like that of Wisconsin, prescribes a form of deed to be given where land is sold for taxes, and provides that the deed given shall be "substantially" in that or "other equivalent form," showing that the land was sold for a sum named "in the whole," a deed is not invalid from which it appears clearly that a sum named was that for which the lands were sold in the whole, although the deed is so worded that another construction might be given to the language used. *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379.

37. If the validity of a deed depend on an act *in pais*, he who claims under it must prove performance of that act. Thus, one who claims under a marshal's deed of land sold under the act of 1798, for non-payment of taxes, must prove compliance with the prerequisites of that act. *Williams v. Peyton*, 4 Wheat. 77.

38. In Ohio, prior to the statute of 1824, a deed on a sale for taxes was not admissible as evidence of title unless accompanied by proof that all the substantial requirements of the law had been met. *Games v. Dunn*, 14 Pet. 322.

39. And an auditor's certificate of compliance was not sufficient; the proceedings or duly authenticated copies thereof had to be shown. *Ib.*

40. Where the objection to a tax deed consists in a want of conformity to the requirements of the statute in the proceedings at the sale, or preliminary thereto, or in the assessment of the tax, or in any like particular, it may be urged at law in ejectment; but an objection on the ground of fraud, or unfair practices of the officer or the purchaser is properly cognizable in equity. *Slater v. Maxwell*, 6 Wal. 268.

41. — *Right of Redemption — Who may redeem — Rights of Purchasers.* Statutes authorizing the redemption of land sold for taxes should be liberally construed, *i. e.*, favorably to the owner. *Dubois v. Hepburn*, 10 Pet. 1.

42. Certainly where they impose a penalty on him and provide full indemnity to the purchaser. *Corbet v. Nutt*, 10 Wal. 464.

43. Under the Pennsylvania statute of March 15, 1815, any person who has any right amounting to ownership in the land, or any right to enter, possess, or enjoy it or any part of it which may be deemed an estate in it, is the owner within the meaning of that provision of the statute which enables the owner to redeem after a sale for taxes. *Dubois v. Hepburn*, 10 Pet. 1.

44. An offer to pay the tax, and a refusal by the treasurer to receive the money, are sufficient, although not amounting to a technical tender, to enable one entitled to redeem to recover the land. *Ib.*

45. One adjudged a bankrupt under the act of 1867, but of whose estate no assignee has been appointed, may redeem his land from a tax

**TAX — COLLECTION — continued.**

sale under a state statute providing that the "owner" of such land may redeem. *Hampton v. Rouse*, 22 Wal. 263.

46. One who is in possession of land claiming title, and therefore bound to pay the taxes thereon, can acquire no title by permitting it to be sold for taxes and buying it in for himself. *Noonan v. Lee*, 2 Black, 499.

47. Where one, as agent of the owner of land, cannot acquire title by redeeming from a tax sale without being guilty of bad faith, his payment of the tax should be treated as a redemption by the owner, and not as a purchase. *Lamborn v. Dickinson County Commissioners*, 97 U. S. 181.

48. A defendant claiming under an Illinois tax deed, who would put the plaintiff to proof of the tender or deposit of the sum required for redemption, as provided by the statute of February 21, 1861, which precludes the questioning of the deed for any cause other than certain causes named, unless such tender or deposit is made, must show not only a tax deed, but also the judgment under which the sale was made. [MILLER, J., dissenting.] *Little v. Herndon*, 10 Wal. 26.

49. A decree on a petition under the Arkansas statute, authorizing a petition in the nature of a bill in chancery, to confirm and quiet a title acquired by a tax deed, is conclusive of the title, where all persons have been notified by publication to come in and defend. *Thomas v. Lawson*, 21 How. 331.

50. A statute requiring the holder of a certificate of a tax sale to give notice to parties in possession before he can have a deed, does not impair the obligation of a contract of sale already made, although as to such contract it is retroactive, and although it increases the difficulty of performance on the part of the purchaser. *Curtis v. Whitney*, 13 Wal. 68.

51. A statute which in effect provides, as does that of Iowa, that one claiming land under a tax deed must, within five years, either himself take actual possession, or bring a suit to recover possession, or be barred from an action on his deed, violates no contract and deprives him of no property without due process of law. The legislature may prescribe the effect of a tax deed, and if this were not so, the purchaser would lose no rights because of there being no one in possession to bring suit against, as he might either take possession himself, or, being out of possession, bring a suit to quiet title, which, in Iowa, interrupts the running of the statute. *Barrett v. Holmes*, 102 U. S. 651.

52. — Remedies for Illegal Collection — Injunction — Action to recover back — When defeated by Voluntary Payment — When Right to tax may not be questioned.] Equity will not restrain the collection of a tax on the sole ground of its illegality. There must be some additional special circumstance bringing the case under some recognized head of equity jurisdiction, such as that relating to multiplicity of suits,

**TAX — COLLECTION — continued.**

to the doing of irreparable injury, or, the property taxed being realty, to a cloud upon titles. *Dows v. Chicago*, 11 Wal. 108; *Hannewinkle v. Georgetown*, 15 Wal. 547.

53. The collection of taxes will not be restrained by injunction, either for illegality or irregularity in the proceedings, or for error or excess in the valuation, or because of the hardship or injustice of the law, if it be constitutional, nor for any grievance which can be remedied by a suit at law, either before or after the payment of the tax. *Taylor v. Secor* [*State Railroad Tax Cases*], 92 U. S. 575.

54. Equity will interfere by injunction to restrain the collection of illegal taxes, where to refuse would involve the plaintiff in a multiplicity of suits as to the title to lots, would prevent their sale, and would cloud their titles. *Union Pacific Railway Co. v. Cheyenne*, 113 U. S. 516.

55. Equity will not enjoin the collection of a tax unless that part which is conceded to be due, or which the court can see ought to be paid, or which can be shown by affidavits to be due, has been paid or unconditionally tendered. *Taylor v. Secor* [*State Railroad Tax Cases*], 92 U. S. 575; *German National Bank v. Kimball*, 103 U. S. 732.

56. If, for the purpose of evading a state tax, a person change his investment to United States notes a day before the day on which property is to be listed for taxation, and two days afterward change back again, a court of equity will not, by injunction, interfere to prevent a levy of a tax assessed regardless of such change, but will leave him to his legal remedies, notwithstanding the exemption of such notes from state taxation. *Mitchell v. Leavenworth County Commissioners*, 91 U. S. 206.

57. Where a county, by its contract for the sale of its lands, stipulates that it will not assess taxes against them until after the delivery of the deed, the delivery of which is delayed to await the performance of certain conditions, an assessment made in contravention of the terms of the contract is void, and proceedings for the collection of taxes thus assessed will be enjoined, and it will make no difference that by some means the deed has been recorded. *Calhoun County v. American Emigrant Co.*, 93 U. S. 124.

58. Where a state sets up title to property adverse to that of the owner, and gives him notice that no legal steps will be taken to enforce the collection of taxes thereon until the title shall be adjusted, it cannot exact interest in the nature of a penalty for non-payment within the time prescribed by law, where the owner, on adjustment of the title, offers to pay with interest at the rate allowed on ordinary debts; and equity will restrain its collection. *Litchfield v. Webster County*, 101 U. S. 773; *Litchfield v. Hamilton County*, Id. 781.

59. One whose coupons are tendered in payment of state taxes, and, because of an unconsti-

**TAX — COLLECTION — continued.**

tutional law impairing the obligation of the state's contract to receive them, are refused acceptance, cannot maintain an action in a federal court under Rev. Sts. § 1979, which gives a right of action to one deprived, under color of a state law, of any right, privilege, or immunity secured by the constitution against an official levying on chattels for the taxes. The right to have the coupons received, or, in case they are refused, to an immunity from such levy, is not directly secured by the constitution. *Carter v. Greenhow*, 114 U. S. 317; *Pleasants v. Greenhow* [Virginia Coupon Cases], Id. 323.

60. Where taxes are illegally assessed, the money paid may be recovered if the collector have notice from the payer that the taxes are regarded as illegal, and that suit will be instituted to recover. *Erskine v. Van Arsdale*, 15 Wal. 75.

61. The payer is entitled to interest from the time of payment. *Id.*

62. A resident of Alexandria, Va., cannot, in a suit to recover the amount by him paid under protest for taxes on his property there situate, question the validity of the retrocession of the county from the United States to Virginia, the state having been since 1847 in *de facto* possession, and neither the State nor the United States questioning its validity. *Phillips v. Payne*, 92 U. S. 130.

63. Where, as in Kansas, the effect of a sale of land for an illegal tax is merely to throw a cloud upon the title, three years being allowed for redemption before the deed is given, the payment of the tax by the owner of the land is deemed a voluntary payment, and not a payment made by compulsion or under duress. Such is the rule adopted by the courts of that state, which furnishes the rule for the supreme court. *Lamborn v. Dickinson County Commissioners*, 97 U. S. 181.

64. In Nebraska, where no demand for taxes is required before enforcing their collection, where warrants were issued for the collection of certain taxes, but no attempt had been made to seize personal property which might have been seized, and no other notice had been given other than that implied by the law, when payment was made under protest, and three years afterwards suit was brought to recover the amount so paid, it was held, no statute giving the right to a recovery in such cases, that the payment must be deemed voluntary and not compulsory, and that the action could not be maintained. *Union Pacific Railroad Co. v. Dodge County Commissioners*, 98 U. S. 541.

*Collector — Action against — Coupons tendered — Obligation of Contract — Removal from State Court.*

See REMOVAL OF CAUSES, 44.

*Collector — Promise to repay Tax illegally Collected — When implied.*

See CONTRACT — WHAT CONSTITUTES, 15.

**TAX — COLLECTION — continued.**

*Court may not collect — When.*

See MUNICIPAL CORPORATION — LIABILITY, 30, 31.

*Deed — Decision of State Court that Tax Deed gives Color of Title — Followed by Federal Courts.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 87.

*Injunction to prevent — Circuit Court may enjoin Collection of State Tax levied on an Agency of the Federal Government.*

See INJUNCTION, 11.

*Injunction — When Collection of Tax against Corporation will be enjoined at Instance of Shareholder.*

See CORPORATION — SUITS, 2.

*Judgment for Taxes — Defect in Form.*

See TAX — ASSESSMENT, 8.

*Payment — Agent to pay Taxes — When deemed Trustee for Principal.*

See TRUST — CREATION AND CONSTRUCTION, 19, 20.

*Payment — Legal Tender.*

See TENDER.

*Payment of Tax on another's Land — Voluntary — Effect.*

See ASSUMPSIT, 9.

*Redemption — Action to recover Lands sold for Taxes — Limitation.*

See LIMITATION — STATUTES, 9.

*Redemption — Question whether one in Possession under Invalid Deed has a Right to redeem on Sale for Taxes — Not Federal.*

See ERROR TO STATE COURT — JURISDICTION, 36.

*Sale — Purchaser in Possession who allows the Land to be sold for Taxes is entitled only to Conveyance subject to Tax Title.*

See VENDOR AND PURCHASER — IN GENERAL, 19.

*Sale — Tax Title — Color of Title — Who may acquire.*

See LIMITATION — ADVERSE POSSESSION, 60, 61.

*Sale vitiated — Assessor's Oath, etc.*

See TAX — ASSESSMENT, 7.

**TAX — POWER — Constitutional Limitations —**

*How Power may be exercised — Uniformity — Unlawful Interference with Inter-state Commerce — Unlawful Discrimination against Property of Non-residents — Power as to Property beyond the Jurisdiction.*

See pl. 1-45.

*What may or may not be taxed — Legacies due Aliens — Debts due Non-residents — Capital employed in Business — Property protected by Letters-patent — Registered Public Debt of another State — Mining*



**TAX — POWER — continued.**

*Claims — Ore dug therefrom — Land granted by the United States — Federal Agencies — United States Bank — Government Bonds, etc. — Emoluments of Federal Officer — Toll on Carriages and Passengers on Cumberland Road — Railroads — Telegraphs.*

See pl. 46-82.

*Relinquishment of Power not to be presumed — Construction of Various Statutes claimed to confer Exemption.*

See pl. 83-102.

1. — *Constitutional Limitations — How Power may be exercised.*] A state has the power to determine what portions of her territory shall, for local purposes, be within the limits of a city and subject to its government, and to prescribe the rate at which such portions shall be taxed. *Kelly v. Pittsburgh*, 104 U. S. 78.

2. An ordinance which imposes an annual tax on the gross receipts of a railroad company, and directs that the amount shall be applied to the payment of state bonds issued to the company, for which the company, as between it and the state, is primarily liable, does not merely change the order of disbursing the receipts of the company, but is an exercise of the power of the state to levy taxes. [WAITE, C. J., dissenting.] *Pacific Railroad Co. v. Maguire*, 20 Wal. 36; *North Missouri Railroad Co. v. Maguire*, Id. 46.

3. Where a state statute attaches, for judicial and revenue purposes, certain unorganized territory to a certain county, taxes on property in such territory are properly levied by the authorities of the county. *Union Pacific Railroad Co. v. Peniston*, 18 Wal. 5.

4. Where state laws prescribing the mode and the subjects of taxation neither trench on federal authority nor violate any right recognized or secured by the constitution, the supreme court cannot relieve a citizen of the state from their enforcement. *Kirtland v. Hotchkiss*, 100 U. S. 491.

5. A change in a state constitution restricting the rate of taxation, and so depriving municipal corporations of the present means to meet their liabilities for damages caused by mobs, does not deprive the holders of judgments for such damages of property without due process of law, within the meaning of the fourteenth amendment. One cannot be said to be deprived of his property in a judgment merely because he is for the present rendered unable to collect it. [BRADLEY and HARLAN, JJ., dissenting.] *Louisiana v. New Orleans*, 109 U. S. 285.

6. A railroad is a public highway, and so a road for public use; and hence a state, in furtherance of that use, may authorize the imposition of a tax to aid in its construction, although the road is built and owned by a private corporation. *Olcott v. Fond du Lac County Supervisors*, 16 Wal. 678.

7. In Wisconsin, a provision in a statute au-

**TAX — POWER — continued.**

thorizing a town to issue bonds to a railroad company, that a tax to pay the interest thereon shall be levied by the supervisors, does not preclude a levy by the town clerk under a general statute making it his duty to levy a tax to pay all debts of the town, — a mandamus upon the supervisors having been issued without avail. *Morgan v. Beloit Town Clerk*, 7 Wal. 610.

8. — *Constitutional Limitations — Uniformity.*] A system of taxation will not be deemed to violate the rule requiring taxation to be uniform, because absolute uniformity has not been attained. *Taylor v. Secor* [*State Railroad Tax Cases*], 92 U. S. 575.

9. Where a state constitution provides that taxation shall be uniform, but confers power on the legislature to tax certain named classes in such manner as it shall direct by general laws, uniform as to the class on which they operate, a law which provides a system of taxation uniform in its operation on the property of members of such a class is valid, although the system does not extend beyond the class to which it applies. *Ib.*

10. A constitutional provision that "no one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied" does not require that taxation shall be universal, but simply that where different kinds of property are taxed the rate of taxation shall be the same on all. *Louisiana v. Pilsbury*, 105 U. S. 278.

11. A statute providing that a certain tax shall be levied on real estate and slaves to the exclusion of personal property does not violate a constitutional requirement that taxes shall be equal and uniform. This requirement, in Louisiana, applies only to state, not to municipal, taxes. *Ib.*

12. A statute providing that a certain tax shall be levied on the property of different municipalities, the consolidation of which is authorized, in proportion to the indebtedness of each, is not invalid, nor is such a provision unreasonable. *Ib.*

13. A state statute authorizing the improvement of a harbor will not be declared invalid by a federal court because it fastens on one county the expense of an improvement for the benefit of the whole state. *Mobile County v. Kimball*, 102 U. S. 691.

14. — *Unlawful Interference with Interstate Commerce.*] A state law imposing a tax on exchange and money brokers does not conflict with the power of congress to regulate commerce. *Nathan v. Louisiana*, 8 How. 73.

15. A tax on a railroad corporation which affects commerce among the states, and impedes the transit of persons and property from one state to another, only as taxation always increases the expenses attendant on the use or possession of the thing taxed, is valid. The state may graduate the tax according to the business or income of the corporation, or according to the

**TAX — POWER — continued.**

value of its property. *Minot v. Philadelphia, Wilmington, & Baltimore Railroad Co.* [*Delaware Railroad Tax*], 18 Wal. 206.

16. While the states have power at their discretion to tax their own internal commerce, and the franchises, property, or business of their own corporations, they may not so exercise that power as to embarrass or restrict inter-state commerce. *Reading Railroad Co. v. Pennsylvania* [*State Freight Tax Case*], 15 Wal. 232.

17. A statute, therefore, as, *e. g.*, the Pennsylvania statute of August 25, 1864, which requires carriers of freight to pay a tonnage tax on freight carried through the state, or taken up within the state and carried out of it, or taken up out of the state and brought within it, is so far unconstitutional and void as a regulation of inter-state commerce, the tax being not a tax on franchises, property, or business, but a tax on freight, and the transportation of freight being an element of commerce; and it makes no difference that the tax applies equally to freight the carriage of which begins and ends within the state. [SWAYNE and DAVIS, JJ., dissenting, holding the tax to be a tax on the business of the carrier.] *Ib.*

18. But a statute, *e. g.*, the Pennsylvania statute of February 23, 1866, which lays a tax on the gross receipts of railroad and other transportation companies, does not lay a tax on freight, but a tax on the companies measured by the extent of their business or of the exercise of their franchises, and is, therefore, not unconstitutional as laying a tax on inter-state commerce, although such receipts are in part derived from inter-state transportation [MILLER, FIELD, and HUNT, JJ., dissenting]; nor is it unconstitutional as laying a duty on imports or exports. *Reading Railroad Co. v. Pennsylvania* [*State Railroad Gross Receipts Tax*], 15 Wal. 284.

19. A state law imposing a uniform tax on all goods of a certain kind, whether manufactured in the state or brought into it, although it provide a mode of collecting the tax on goods brought, in differing from the mode of collecting that on goods manufactured, is not a regulation of commerce within the meaning of the constitution, but a legitimate exercise of the taxing power, there being no discrimination against the products of other states. *Hinson v. Lott*, 8 Wal. 148.

20. Steamboats which ply between different ports on a navigable river may be taxed, under a state statute, as personal property by the city where the company owning them has its principal office, and which is their home port, although they are duly enrolled and licensed as coasting vessels under federal laws, and all fees and charges thereon, demandable under those laws, have been duly paid. The imposition of such a tax is not a levy of duties on tonnage, nor a regulation of commerce. *Wheeling, Parkersburg, & Cincinnati Transportation Co. v. Wheeling*, 99 U. S. 273.

21. A state cannot tax the capital stock of a

**TAX — POWER — continued.**

corporation chartered in another state, and the business of which consists in maintaining a ferry between the two states. The attempt to impose such a tax is an attempt unlawfully to interfere with inter-state commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

22. A city ordinance imposing a license tax on dealers in beer and ale "not manufactured in the city" is not forbidden by the constitution as a regulation of commerce, or as a denial of an inter-state immunity or privilege, so far as it applies to dealers in beer and ale made within the state. *Downham v. Alexandria*, 10 Wal. 173.

23. While a statute, such as that of Texas of June 3, 1873, which discriminates, in the imposition of a license tax, between the sale of beer and wine made within, and that made without, the state, is so far inoperative, yet one who is engaged in the business of selling not only beer and wine, but other liquors subject to the same tax, but concerning which there is no discrimination in favor of the home manufacture, cannot be heard to complain that he is unjustly taxed. *Tiernan v. Rinker*, 102 U. S. 123.

24. A state statute imposing on non-residents selling by card, catalogue, or sample goods not manufactured in the state, a license tax higher than it imposes on resident traders, is repugnant to that provision of the constitution which relates to privileges and immunities of citizens in the several states, and therefore void. [BRADLEY, J., concurring, but holding the act void also as a regulation of commerce.] *Ward v. Maryland*, 12 Wal. 418.

25. A uniform state tax on all sales made in the state, whether made by a citizen of that state or another, and whether of goods the produce of that state or another, is not invalid. [NELSON, J., dissenting.] *Woodruff v. Parham*, 8 Wal. 123.

26. Nor is a uniform state tax on all goods of a certain kind, whether manufactured in the state or brought into it, although the mode of collecting the tax on the goods brought in be different from the mode of collecting that on goods manufactured. [NELSON, J., dissenting.] *Hinson v. Lott*, 8 Wal. 148.

27. A city ordinance laying a license tax on all express companies doing business in the city whose business extends beyond the limits of the state, a smaller tax on companies doing business within the state, and a still smaller one on companies doing business within the city, is not repugnant to the constitution as a regulation of commerce. It imposes no burden on inter-state commerce, is merely a tax on business carried on within the state, and does not discriminate between citizens of the state and citizens of other states. *Osborne v. Mobile*, 16 Wal. 479.

28. A statute which prohibits dealing in goods not the growth, produce, or manufacture of the state, by going from place to place in the state to sell the same, without a license taken and paid for, but does not prohibit like dealing in

**TAX — POWER — continued.**

goods the growth, etc., of the state, is, in effect, a tax on the goods, and a regulation of inter-state commerce, within the meaning of the constitution, — the power of congress to regulate continuing when goods are brought into a state until they have ceased to be the subject of discriminating legislation; and it makes no difference as to its validity that congress has not exercised its power over such commerce, non-exercise being equivalent to a declaration that such commerce shall be unrestricted. *Willon v. Missouri*, 91 U. S. 275.

**29. — Unlawful Discrimination against Property of Non-residents.** A state statute which, while imposing a tax on peddlers, does not discriminate between articles manufactured in the state and those out of it, is constitutional. *Howe Machine Co. v. Gage*, 100 U. S. 676.

**30.** State legislation which discriminates between resident and non-resident merchants, or between produce the manufacture of the state and that manufactured in other states, *e. g.*, a statute which, like that of Virginia, requires an agent for the sale of articles manufactured out of the state, and those only, to obtain and pay for a license for each county in which he sells or offers to sell them, is unconstitutional and void. *Webber v. Virginia*, 103 U. S. 344.

**31.** A state, in the exercise of its taxing power, cannot impose on the products of other states brought within its limits for sale or use a more onerous burden or tax than on like products raised or produced within the state, nor discriminate against those engaged in bringing into the state or selling such products. *Guy v. Baltimore*, 100 U. S. 434.

**32.** A municipal ordinance, therefore, passed in pursuance of authority conferred by a state statute, which, while exempting from wharfage charges products of the state landed at the public wharves, imposes a charge on products of other states, is invalid. [WATKINS, C. J., dissenting.] *Ib.*

**33.** Nor can it be justified under the power of the municipality to require reasonable compensation for the use of its wharves, it being an expedient merely to accomplish by indirect means the building up of its domestic commerce by means of unequal burdens upon the industries of other states. [WATKINS, C. J., dissenting.] *Ib.*

**34.** Nor can it be justified under the police power. *Ib.*

**35.** The imposition, by a city, of a license tax for ferry-boats plying between the city and a point in another state is not an unlawful regulation of commerce between the states. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

**36.** Coal mined in one state and sent to a port of another to be sold in open market may be taxed as property in the latter state, although it is liable to be sold for transshipment abroad without being landed. *Brown v. Houston*, 114 U. S. 622.

**37.** A state statute imposing a tax on railroad and stage companies for every passenger carried

**TAX — POWER — continued.**

out of the state, virtually taxes the passenger, not the business of the company, and is unconstitutional and void, not as laying a duty on tonnage, nor as a regulation of commerce, for if a regulation of commerce, it is a regulation of such a merely local matter as states may legislate about, in the absence of legislation by congress, but as an invasion of the right of the government to call citizens to the seat of government and to all places where the functions of government are performed, and to transport troops, and the right of citizens to go to those places. [CHASE, C. J., and CLIFFORD, J., dissenting, thinking the statute unconstitutional as a regulation of commerce, and not for the reasons assigned by the court.] *Crandall v. Nevada*, 6 Wal. 35.

**38.** But a stipulation in the charter of a railroad company that the company shall pay to the state a percentage of its earnings is not unconstitutional either as a regulation of commerce or as a discrimination against the citizens of other states or otherwise. Such a stipulation is different in principle from the imposition of a tax on the movement or transportation of goods or persons from one state to another. [MILLER, J., dissenting.] *Baltimore & Ohio Railroad Co. v. Maryland*, 21 Wal. 456.

**39. — Power as to Property beyond the Jurisdiction.** A state cannot authorize the deduction of a tax from interest on bonds issued by a railroad company part of whose road lies in another state in which the company has been incorporated, the bonds being secured by mortgage of the entire road, as such a tax amounts to a tax on property without the jurisdiction. [CLIFFORD and SWAYNE, JJ., dissenting.] *Northern Central Railway Co. v. Jackson*, 7 Wal. 262.

**40.** The power of a state to tax is limited to persons, property, and business within the jurisdiction; and hence a statute which assumes to tax railroad bonds issued by a home corporation, but held by a non-resident (such bonds, like mortgages and debts generally, having no *situs* independent of the domicile of the owner), by directing the company to withhold a percentage of the interest thereon and pay the same to the state, is invalid as impairing the obligation of the contract between the company and the bondholder; and this, although the bonds are secured by mortgage on the property of the company within the state, a mortgage, in that state, not transferring title, but merely giving a lien as security for the debt. [CLIFFORD, MILLER, DAVIS, and HUNT, JJ., dissenting, on the ground of state decisions to the contrary.] *Cleveland, Painesville, & Ashtabula Railroad Co. v. Pennsylvania*, 15 Wal. 300; *Pittsburg, Fort Wayne, & Chicago Railroad Co. v. Pennsylvania*, *Id.* 326.

**41.** The ferry-boats of a corporation engaged in carrying passengers, etc., across a river to and from a city in a state other than that in which it is incorporated and in which it has its property, in which its engineers and pilots reside, and in

**TAX — POWER — continued.**

which its boats are laid up when not in use, are not taxable under a law of such other state taxing boats within the city; and this, although the principal officers of the corporation reside in the city, and the corporation has an office there, and there holds its ordinary business meetings, and there receives and disburses its money. *St. Louis v. Wiggins Ferry Co.*, 11 Wal. 423.

42. A statute which provides that a railroad company whose road lies partly in adjoining states shall be taxed on such number of the shares of its capital stock as would be in that proportion to the whole number which the length of the road within the state bears to its whole length, and that income and earnings shall be taxed on the same principle, is not a tax on shares nor on property, but a tax on the corporation itself, and therefore valid. *Minot v. Philadelphia, Wilmington, & Baltimore Railroad Co.* [*Delaware Railroad Tax*], 18 Wal. 206.

43. A statute taxing all railroad companies "doing business within the state, and upon whose road freight may be transported," applies to a company one tenth only of whose road is in the state. *Erie Railway Co. v. Pennsylvania*, 21 Wal. 492.

44. An ocean steamer plying regularly between ports in a state other than that of the port at which she is owned and registered and a foreign port, remaining at the former only long enough to land and receive passengers and cargo, and to take on supplies and make repairs, is not subject to taxation in that state, but in the state of her home port. *Hays v. Pacific Mail Steamship Co.*, 17 How. 596.

45. So of a vessel plying regularly between ports of states other than that of her home port; and it makes no difference that she has been enrolled and licensed at one of those ports as a coaster. *Morgan v. Parham*, 16 Wal. 471.

46. — *What may or may not be taxed — Legacies due Aliens — Debts due Non-residents — Capital employed in Business — Property protected by Letters-patent — Registered Public Debt of another State — Mining Claims — Ore dug therefrom.* A state law taxing legacies payable to aliens is not repugnant to any provision of the constitution. *Mager v. Grima*, 8 How. 490.

47. The constitution does not prohibit a state from taxing her resident citizens for debts against non-residents, evidenced by bonds payment of which is secured by trust deeds or mortgages of land in another state. A debt, for the purposes of taxation, has its *situs* at the residence of the creditor. *Kirtland v. Hotchkiss*, 100 U. S. 491.

48. One assessed as of a certain date on personal property to a certain amount which, in fact, consisted of money on that day, cannot escape taxation on the ground that the money was his capital employed in the business of purchasing cotton for exportation to foreign countries. While, in a mercantile sense, continuously so em-

**TAX — POWER — continued.**

ployed, if not actually thus invested on that day, it was properly assessed. *People v. New York Tax Commissioners*, 104 U. S. 466.

49. Letters-patent granted by the United States do not exclude from the operation of the tax or license law of a state the tangible property in which the invention or discovery is embodied. *Webber v. Virginia*, 103 U. S. 344.

50. The fact that a state exempts from taxation, or itself taxes, its registered public debt, does not under the constitution prevent another state from taxing it as the property of one of its citizens. *Bonaparte v. Tax Court*, 104 U. S. 592.

51. Ore dug under a mining claim from land the title to which is still in the United States, is free from any government lien or claim, and taxable as personal property. *Forbes v. Gracey*, 94 U. S. 762.

52. A mining claim is property, and may be taxed as such; and the Nevada statute of February 28, 1871, giving a lien for taxes on such claims, is properly applicable to the possessory right to work and explore mines the title to which is in the United States. *Id.*

53. — *What may or may not be taxed — Land granted by the United States.* A sale for state taxes of land which is still public land of the United States is invalid. *McGoon v. Scales*, 9 Wal. 23.

54. Under the law of Michigan, land for which patent certificates have been issued is liable to taxation at its full value as the property of the purchaser, although no patent has been issued therefor; and such a law is valid under the constitution and laws of the United States. *Carroll v. Safford*, 3 How. 441.

55. Land ceases to be public on entry at the land office and delivery of a certificate thereof, and then becomes subject to state taxation, whether the patent issue then or afterwards; and it makes no difference whether the entry is for cash or upon donation. *Wiherspoon v. Duncan*, 4 Wal. 210; *Union Pacific Railway Co. v. Prescott*, 16 Wal. 603.

56. But this is so only where the right to the patent is complete, not where something going to the foundation of the right remains to be done, as, for instance, where, by the terms of the grant, payment by the grantee of the cost of surveying, etc., is to be made before conveyance, and payment has not been made. *Kansas Pacific Railway Co. v. Prescott*, 16 Wal. 603; *Union Pacific Railroad Co. v. McShane*, 22 Wal. 444. See *Hunnewell v. Cass County*, 22 Wal. 464.

57. Nor is it subject to be taxed where it is granted in aid of the construction of a railroad on the proviso that any land not sold by the company within a certain time from the completion of the road shall be open to pre-emption and sale at a stated price, the purchase-money to go to the company. *Kansas Pacific Railway Co. v. Prescott*, 16 Wal. 603. Overruled in *Union*

**TAX — POWER — continued.**

*Pacific Railroad Co. v. McShane*, 22 Wal. 444.

58. And it makes no difference that the railroad company has mortgaged the land under sanction of an act of congress, the government having an interest until it conveys it by patent or otherwise. *Union Pacific Railroad Co. v. McShane*, 22 Wal. 444.

59. Where the original grant has been perfected by the issue of a patent, the right of the state to tax, like that of the grantor to sell, is perfect. *Id.*

60. If congress grants land to a state to be sold to aid in building a railroad, the grant providing that such part of the land as remains unsold shall revert in case of a failure to finish the road, and the state grants the land to a railroad company on terms and conditions the same as those imposed by the grant from the United States, and the company, unable to sell lands in advance of the completion of the road, raises money for the purpose by mortgaging them, and completes the road, the state may tax the lands so mortgaged. It cannot be contended that the United States has an interest in them which interferes with the right of the state to tax them. *Tucker v. Ferguson*, 22 Wal. 527.

61. *Semble* that, under the statutes of Nebraska, where lands have been exempt from state taxation by reason of claims thereon by the United States, those lands may be included in the assessment where those claims are satisfied before the assessment is completed. *Hunnewell v. Cass County*, 22 Wal. 464.

62. — *What may or may not be taxed — Federal Agencies — United States Bank — Government Bonds, etc. — Emoluments of Federal Officer — Toll on Carriages and Passengers on Cumberland Road — Railroads — Telegraphs.* The states have no power by taxation to impede, burden, or control the operation of constitutional laws enacted to put in effect the powers of the federal government; none, for instance, to impose a tax on the operation of a branch of the Bank of the United States. *McCulloch v. Maryland*, 4 Wheat. 316.

63. A state law imposing a tax other than a tax on local property on one of the branches of the Bank of the United States is unconstitutional. *Osborn v. United States Bank*, 9 Wheat. 733.

64. A tax on stock issued for a loan to the government, and held by a citizen of a state, is a tax on the power to borrow money on the federal credit, and cannot be levied by, or under the authority of, a state, under the constitution. [JOHNSON and THOMPSON, JJ., dissenting.] *Weston v. Charleston*, 2 Pet. 449.

65. A state statute which authorizes the levy of a tax on the capital of a bank at its assessed value, in whatever invested, in effect authorizes a tax on government bonds in which the capital may be invested, and is, therefore, unconstitutional

**TAX — POWER — continued.**

tional and void, the power to make such a law being inconsistent with the constitutional power of the government to borrow money, as enabling the state to exclude such securities from its markets. *Bank of Commerce v. New York*, 2 Black, 620.

66. A tax on banks "on a valuation equal to the amount of their capital stock paid in, or secured to be paid in," is a tax on their property, and a state law laying such a tax is void as to property consisting of government bonds. *Bank Tax Case*, 2 Wal. 200.

67. United States notes issued under the acts of February 25 and July 11, 1862, and March 3, 1863 (12 Sts. 345, 532, and 709), although issued as currency, were yet national obligations, and exempt from state taxation. *New York Bank v. Supervisors*, 7 Wal. 26.

68. Certificates of indebtedness issued by the government to its creditors for supplies furnished to enable it to carry on the war of the rebellion are not subject to taxation by the states. *Banks v. New York*, 7 Wal. 16.

69. A state statute requiring mere saving societies to pay annually to the state a sum equal to a certain per cent of the total amount of their deposits on a given day, is a tax on the franchise, not on the property, and valid, although a part of the deposits are invested in government securities exempt from state taxation. [CHASE, C. J., and GRIER and MILLER, JJ., dissenting.] *Savings Society v. Coits*, 6 Wal. 594.

70. And so of a statute requiring institutions for savings to pay to the state a tax on account of their depositors, amounting to a certain per centage of the amount of their deposits, to be assessed on the basis of semi-annual averages thereof. [CHASE, C. J., and GRIER and MILLER, JJ., dissenting.] *Provident Institution for Savings v. Massachusetts*, 6 Wal. 611.

71. So also of a statute requiring corporations having a capital stock divided into shares to pay a tax on "the excess of the market value" of all such stock over the value of their real estate and machinery, although a part of the property of such corporations consist of such securities. [CHASE, C. J., and GRIER and MILLER, JJ., dissenting.] *Hamilton Manufacturing Co. v. Massachusetts*, 6 Wal. 632.

72. And as to the subject of taxation in the two last preceding cases, such is the law of Massachusetts. *Id.*

73. The declaration of Rev. Sts. § 3408, that "deposits . . . in savings banks . . . shall be exempt on so much thereof as they have invested in securities of the United States . . . and on all deposits not exceeding \$2,000," should be construed as though its last clause read, and on all sums not exceeding \$2,000 deposited in the name of any one person. This construction, also, brings the provision into harmony with the amendatory act of March 1, 1879 (20 Sts. 327, 352). *Savings Bank v. Archbold*, 104 U. S. 708.

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74. It is not within the power of a state to impose a tax on the emoluments of office of a federal officer. *Dobbins v. Erie County Commissioners*, 16 Pet. 435.

75. The Pennsylvania statute of 1836, imposing a toll on carriages carrying the mail over the portion of the Cumberland Road within that state, held to be in conflict with the compact between the state and the general government arising out of the act of March 3, 1835 (4 Sts. 772), under which the state took possession of the road. [McLEAN and DANIEL, JJ., dissenting.] *Searight v. Stokes*, 3 How. 151.

76. The Ohio statute of 1837, imposing a toll on passengers in mail stage-coaches over the portion of the road within that state, to the exclusion of passengers by other vehicles, in effect exacts a toll of mail coaches; and is, therefore, also in violation of the compact between the state and the government, under which the former took possession of the road. [DANIEL, J., dissenting.] *Neil v. Ohio*, 3 How. 720.

77. So of the Maryland statute of 1843, imposing toll on every passenger in a mail coach, to be paid by the owner of the coach, in lieu of tolls on other coaches, and requiring of such owner the payment of a gross sum at each gate, for neglect to report the number of his passengers, such payment being a commutation rather than a penalty, and the effect of the whole statute being to impose a tax on the United States. *Achison v. Huddleson*, 12 How. 293.

78. In the absence of special statutory provision, the property of a railroad company incorporated by a state, and holding its property within the state jurisdiction and under state protection, is not exempt from state taxation as belonging to an instrument of the government, although the construction of the road was authorized by congress in part for government uses and purposes. *Thomson v. Union Pacific Railroad Co.*, 9 Wal. 579.

79. Nor is the property of a railroad company incorporated by congress, aided by gifts and loans from the government, and subject to some extent to government supervision, although the government has a lien on the road, and may take possession and assume control thereof on non-compliance with the charter, and although the company is bound to transmit government despatches and transport mails, troops, supplies, etc., as required. A tax on its property does not deprive the company of its powers as an agent of the government, as might a tax on its operations. [FIELD, BRADLEY, and HUNT, JJ., dissenting.] *Union Pacific Railroad Co. v. Peniston*, 13 Wal. 5.

80. The exemption of agencies of the federal government from state taxation depends not on the fact that they are such, nor on their nature, nor on the mode of their constitution, but on the effect of the tax to deprive them of the power to serve the government as they were intended to serve it, or to hinder them in the effi-

**TAX — POWER — continued.**

cient exercise of that power; and here a distinction may be taken between a tax on the operations of such agencies, and a tax on their property. *Id.*

81. In respect to its foreign and inter-state business, a telegraph company is, as an instrument of commerce, subject to the regulating power of congress, and if it accept the provisions of Rev. Sts. § 5263 *et seq.*, relative to such companies, it becomes a federal agent so far as government business is concerned. *Western Union Telegraph Co. v. Texas*, 105 U. S. 460.

82. Hence, when a company has accepted those provisions, a state law imposing a specific tax on each message which it transmits beyond the state, or which a federal officer sends over its lines on public business, is so far unconstitutional. *Id.*

83. — *Relinquishment of Power not to be presumed — Construction of Various Statutes claimed to confer Exemption.* A state legislature, unrestricted by constitutional prohibition, has power to exempt property from taxation. *Tomlinson v. Branch*, 15 Wal. 460.

84. A relinquishment of the power of taxation is not to be presumed. *Providence Bank v. Billings*, 4 Pet. 514; *Philadelphia & Wilmington Railroad Co. v. Maryland*, 10 How. 376.

85. An agreement not to tax property otherwise than in a certain manner, or within certain limits, is not to be inferred from the language of a statute, unless such language admit of no other reasonable construction. *Tucker v. Ferguson*, 22 Wal. 527; *Hoge v. Richmond & Danville Railroad Co.*, 99 U. S. 348; *Memphis Gas-Light Co. v. Shelby County Taxing District*, 109 U. S. 398.

86. The power of the state to tax railroad property cannot be deemed to have been relinquished, unless the intention is declared in clear and unambiguous terms, certainly not from a statute which, like the Missouri statute of February 16, 1865, relating to the North Missouri Railroad Company, contains no reference to the subject of taxation. *North Missouri Railroad Co. v. Maguire*, 20 Wal. 46.

87. A state will not be deemed to have deprived itself of the right further to tax a foreign railroad corporation which has been permitted to locate in such state a portion of its road, by the mere fact that, at the time the privilege was granted, provision for taxation was made. *Erie Railway Co. v. Pennsylvania*, 21 Wal. 492.

88. A legislative declaration that a certain ferry shall be subject to the same taxes that are or may be imposed on other ferries within the state, provides only that such ferry shall be taxed no more than other property similarly situated. It does not exempt from such license tax as the state or municipality has authority to impose. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

89. A statute not exempting property from taxation, but declaring that property theretofore

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exempt shall be liable to state taxation, is not within the purview of a subsequent constitutional provision declaring void all laws exempting property from taxation. *Savannah v. Jesup*, 106 U. S. 563.

90. Where the charter of a corporation exempts its stock from taxation, and a subsequent statute provides that its property shall be deemed a part of its capital stock, and shall be vested in the respective shareholders according to their respective shares, it cannot be claimed that the exemption extends only to the separate shares of the individual stockholders. *Trask v. Maguire*, 18 Wal. 391.

91. An exemption of the property of a railroad corporation from taxation until the road shall be completed and in operation and a dividend declared, after which the property "shall be subject to taxation at the rate assessed by the state on other real and personal property of like value," cannot be deemed to exempt the property of the corporation from county, school, or city taxes. No presumption can be made in favor of such an exemption. *Bailey v. Magwire*, 22 Wal. 215.

92. Nor can the fact that the charter of the corporation makes special provision for ascertaining the taxes to become due to the state, while silent as to other taxes, be considered evidence of an intention to confer an exemption from taxation for county, school, and city purposes. *Id.*

93. A statute which, while withdrawing from a railroad corporation an existing immunity from taxation, appears to establish a system of taxation by the state for its benefit exclusively, providing for returns to the comptroller-general only, for payment to that officer of the taxes assessed, and for payment by him into the state treasury, no provision being made for local taxation, will not be deemed to confer the right of municipal taxation. [MILLER, J., dissenting.] *Savannah v. Jesup*, 106 U. S. 563.

94. A grant to a railroad company, "for the purpose of making and using" its road, of "all the powers, rights, and privileges" before conferred on another company, is not a grant of that company's immunity from taxation. *Memphis & Charleston Railroad Co. v. Gaines*, 97 U. S. 697.

95. So a grant of "all the rights and powers necessary to the construction and repair of its railroad," and for this purpose to "have and use all the powers and privileges" of a certain other railroad company the property and franchises of which are exempt from taxation, does not confer exemption, it not being necessary for the objects specified. *Annapolis & Elk Ridge Railroad Co. v. Anne Arundel County Commissioners*, 103 U. S. 1.

96. An agreement on the part of a state to impose specific taxes only on a railroad company, is not violated by the imposition of a general tax on land granted to the company to aid it in building its road, and which it has mortgaged for that

**TAX — POWER — continued.**

purpose. *Tucker v. Ferguson*, 22 Wal. 527. See *West Wisconsin Railway Co. v. Trempealeau County Supervisors*, 93 U. S. 595.

97. The provision of a railroad company's charter which exempts forever from taxation its capital stock and dividends, does not exempt land granted by congress to the state in aid of the road, and by the state transferred to the company. *Cairo & Fulton Railroad Co. v. Loftin*, 98 U. S. 559; *Memphis & St. Louis Railroad Co. v. Loftin*, 105 U. S. 258.

98. The act of the assembly of the District of Columbia of June 26, 1873, exempting from taxation for ten years from that date all property of more than a certain value which thereafter might be employed for manufacturing purposes, did not create a contract with the owners of such property, but was a mere bounty law, good until repealed, and the act of June 20, 1874 (18 Sts. 117), superseding the then existing government of the district, and directing a levy of taxes on all real estate, with certain specified exceptions, conferred the right to tax such property. [FIELD, J., dissenting.] *Welch v. Cook*, 97 U. S. 541.

99. Where a bank has the right to purchase and hold a lot of ground "for the use of the institution as a place of business," and its charter also declares that it "shall pay to the state an annual tax of one half of one per cent on each share of capital stock, which shall be in lieu of all other taxes," such part of a building on a lot bought by it as it does not use as a place of business, but lets out to others, is properly taxed. *Bank of Commerce v. Tennessee*, 104 U. S. 493.

100. A bank empowered to hold free from taxation such real property as may be conveyed to it to secure its debts, is liable for taxes on property purchased at a sale under a deed of trust taken by it to secure money lent. *Id.*

101. A statute providing that swamp and overflowed lands "shall be exempt from taxation for the term of ten years, or until said lands are reclaimed," confers exemption for ten years, only in case the lands are not sooner reclaimed. *Memphis & St. Louis Railroad Co. v. Loftin*, 105 U. S. 258.

102. Under a statute which, like the Ohio statute, exempts from taxation shares of corporations "the capital stock of which is taxed in the name of the company," shares of stock in a foreign corporation which pays taxes in the state only on that portion of the property therein situated are not exempt. *Sturges v. Carter*, 114 U. S. 511.

*Congress — Power to tax in District of Columbia.*

See DISTRICT OF COLUMBIA, 1.

*Municipal Corporation — Limitation on Power of Taxation.*

See MUNICIPAL CORPORATION — FISCAL POWERS, 11, 12.

**TAX — POWER — continued.**

*Municipal Corporation — Power to levy Taxes in Annexed Territory.*

See MUNICIPAL CORPORATION — LIABILITY, 3.

*Private Corporation — Power to tax.*

See CORPORATION — POWERS AND LIABILITIES, 10, 11.

*Property taxable — Decision that Foreign Railroad Company is doing Business in State and so taxable, followed by Federal Courts.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 90.

*Property taxable — Exemption as affected by Consolidation of Railroads.*

See RAILROAD — CONSOLIDATION, 10 *et seq.*

*Property taxable — Exemption — Contracts not to tax — Impairment of Obligation.*

See CONTRACT — IMPAIRMENT OF OBLIGATION, 37-54.

*Property taxable — Exemption — Corporate Property exempt by Statute — Power to tax cannot be asserted collaterally.*

See CORPORATION — POWERS AND LIABILITIES, 33.

*Property taxable — Exemption — Effect of Provisions of Charter concerning Taxation.*

See CORPORATION — CHARTER, 35, 36.

*Property taxable — Exemption — Railroad Company.*

See RAILROAD — COMPANY, 38 *et seq.*

*Property taxable — Exemption — Railroads — Consolidation, how affecting.*

See RAILROAD — CONSOLIDATION, 10 *et seq.*

*Property taxable — Exemption — Repeal.*

See CORPORATION — CHARTER, 4.

*Property taxable — Exemption — Revenues of Municipal Corporation exempt from Federal Taxation.*

See INTERNAL REVENUE — IN GENERAL, 4.

*Property taxable — Imports unsold in Original Packages — States have no Power to tax.*

See DUTIES — IN GENERAL, 1 *et seq.*

*Property taxable — National Bank Shares.*

See NATIONAL BANK, 51-73.

*Property taxable — Power of States to tax Indian Lands.*

See INDIANS, 32 *et seq.*

*Property taxable — Property in Territory ceded by a State to the United States, when taxable by the State.*

See CONGRESS, 4.

*Property taxable — Railroad Company operating Road in another State.*

See RAILROAD — COMPANY, 15.

**TELEGRAPH COMPANY** — *Federal Agency exempt from State Tax, when.*

See TAX — POWER, 81 *et seq.*

*Power of Congress and of States over.*

See COMMERCE, 50-53.

*Status of, in State other than that of Incorporation.*

See CORPORATION — FOREIGN, 9.

**TENANT** — *Joint Tenants — In general.*

See JOINT TENANTS.

*Landlord and Tenant — In general.*

See LANDLORD AND TENANT.

*Tenants in Common — In general.*

See TENANTS IN COMMON.

**TENANTS IN COMMON** — *Possession of one Possession of all — Ouster — Remedies, etc.]*

Although generally the entry and possession of one tenant in common is the entry and possession of all, yet if one enter on part of the land under a partition, claiming that part in severalty, his possession thereof will be adverse, even if the partition be invalid. *Clymer v. Dawkins*, 3 How. 674.

2. Nothing in the Nevada statutes varies the rule that the possession of one co-tenant is the possession of all. And the rule applies to mining claims. *Union Consolidated Silver Mining Co. v. Taylor*, 100 U. S. 37.

3. One tenant in common cannot maintain ejectment against his co-tenant without actual ouster. *Barnitz v. Casey*, 7 Cranch, 456.

4. Although a tenant in common may oust his co-tenant and hold in severalty, a silent possession, unaccompanied by any act that can amount to ouster or notice of adverse holding, is not adverse. *McClung v. Ross*, 5 Wheat. 116.

5. Where tenancy in common is of an indivisible thing, a right of action therefor necessarily survives on the death of one of the tenants. *Shelby v. Guy*, 11 Wheat. 361.

6. In California, a tenant in common suing in ejectment may recover the entire premises, as against any one other than a co-tenant, or a person holding under one, but to hold in subordination to the rights of his co-tenants. *Hardy v. Johnson*, 1 Wal. 371.

*Joint Tenants, etc. — In general.*

See JOINT TENANTS.

*Partition — Parties to Suit — Jurisdiction depending on Citizenship, etc.*

See PARTITION, 2 *et seq.*

*Tenants holding under one Patent — Partition — Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 127.

*Title derived from one of several Tenants in Common sufficient to defend Possession.*

See EJECTMENT — IN GENERAL, 28.



**TENANTS IN COMMON** — *continued.*

*Title — Outstanding — Purchase by Tenant — Trust.*

See **TRUST — CREATION AND CONSTRUCTION**, 36, 37.

**TENDER** — *What constitutes — Money in which a Tender must be made — Paper Money — Coin.*

See pl. 1-6.

*Tender on Condition — Effect of Tender.*

See pl. 7-9.

*Constitutionality of the Legal-tender Acts.*

See pl. 10-13.

1. — *What constitutes — Money in which a Tender must be made — Paper Money — Coin.* An obligation for the payment of a sum "in gold and silver coin, lawful money of the United States," entered into prior to the passage of the legal-tender act of February 25, 1862 (12 Sts. 592), cannot be discharged by a tender of currency notes issued under that act and acts subsequent. [MILLER, J., dissenting.] *Bronson v. Rodes*, 7 Wal. 229. And see *Bronson v. Kimpton*, 8 Wal. 444.

2. Nor can an obligation to pay "a sum of £15, current money" of a certain state, in "English golden guineas" of certain weight, "and other gold and silver" at regular weight and rate. *Buller v. Horwitz*, 7 Wal. 258. And see *Bronson v. Kimpton*, 8 Wal. 444.

3. Nor can an obligation "payable in specie," specie by usage meaning "gold and silver coin," and the act of 1862, in declaring such notes a legal tender for debts meaning only debts payable in money generally. [MILLER and BRADLEY, JJ., dissenting.] *Trebilcock v. Wilson*, 12 Wal. 687.

4. An obligation for the payment of a certain weight of gold in coined money, is payable in coined dollars, and not in legal-tender notes equivalent in value to the value in coin of such weight of gold. *Dewing v. Sears*, 11 Wal. 379.

5. United States notes issued under the act of 1862 and acts following, are not legal tender for taxes imposed by state authority, such taxes not being debts within the meaning of those acts. *Lane County v. Oregon*, 7 Wal. 71.

6. The rule that bank-bills are a good tender, if not objected to at the time on the ground that they are not money, applies only to current bills which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. *Ward v. Smith*, 7 Wal. 447.

7. — *Tender on Condition — Effect of Tender.* A tender on condition that a release be delivered before delivery of the thing tendered, is bad, in the absence of an express stipulation for such previous delivery. *Hepburn v. Auld*, 1 Cranch, 321.

8. A tender to stop interest or costs must be

**TENDER** — *continued.*

kept good. It ceases to have that effect where the money is used by the debtor for any other purpose. *Bissell v. Heyward*, 96 U. S. 580.

9. A tender of the sum due will operate as a bar to the recovery of costs. *Tremlett v. Adams*, 13 How. 295.

10. — *Constitutionality of the Legal-tender Acts.* An act making notes or bills of credit a legal tender in payment of pre-existing debts is not a means appropriate, plainly adapted, or really calculated to carry into effect any express power of congress, whether the war power or any other; and hence the several acts of 1862 and 1863 to provide a national currency, so far as they make such notes a legal tender in such case, are unconstitutional, especially since they are inconsistent with the spirit of other provisions of the constitution; *e. g.*, the provision relative to laws impairing the obligation of contracts, and the provisions forbidding the taking of private property without compensation or without due process of law. [MILLER, SWAYNE, and DAVIS, JJ., dissenting, on the ground that those acts were necessary, in the sense of the constitution, to the exercise of the war power.] *Hepburn v. Griswold*, 8 Wal. 603.

11. Overruled by *Knox v. Lee* [Legal-tender Case], 12 Wal. 457.

12. An act making notes or bills of credit a legal tender in payment of debts contracted either before or after its passage, is, in case of exigency, a means appropriate and plainly adapted to the exercise of the war power, or of the power, resulting from an aggregate of powers, to act, by any means not prohibited, for the preservation of the government; and the acts of 1862 and 1863 to provide a national currency, so far as they make such notes a legal tender, are upon that ground constitutional: no negation of the power to pass such an act, but the contrary, is to be implied from the grant of power to coin money and regulate its value; nor is such an act inconsistent with the spirit of those provisions of the constitution which forbid the taking of private property without compensation or without due process of law, or of that provision which relates to laws impairing the obligation of contracts, congress having power indirectly to impair the obligation of contracts, and the obligation of contracts for the payment of money being merely to pay that which the law may recognize as money when the payment is made. [CHASE, C. J., and NELSON, CLIFFORD, and FIELD, JJ., dissenting, on the general ground taken in the decision of *Hepburn v. Griswold*, which is hereby overruled.] *Knox v. Lee* [Legal-tender Case], 12 Wal. 457; *Dooley v. Smith*, 13 Wal. 604 [CHASE, C. J., and CLIFFORD and FIELD, JJ., dissenting]; *Norwich & Worcester Railroad Co. v. Johnson*, 15 Wal. 195 [CHASE, C. J., and CLIFFORD and FIELD, JJ., dissenting]. See *The Vaughan*, 14 Wal. 258; *Bigler v. Waller*, 14 Wal. 297.

**TENDER** — *continued.*

13. The power to make notes of the government a legal tender in payment of private debts being one of the ordinary powers of sovereignty, and here not expressly withheld, and being included in the power to borrow money and to provide a national currency, is a power conferred on congress by the constitution; and whether at any time, in war or in peace, the exigency is such as to justify its exercise, is a question for congress itself, and not the courts, to determine; and it makes no difference that its exercise may incidentally affect the value of private contracts. The act of May 31, 1878 (20 Sts. 87), authorizing the reissue of such notes returned to the treasury, is, therefore, not unconstitutional. [FIELD, J., dissenting.] *Juilliard v. Greenman* [Legal-tender Case], 110 U. S. 421.

*Direct Tax under Act of 1861.*

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**TERRITORIAL COURTS** — *Nature — Not Courts of United States — Jurisdiction, in general — Over Indian Reservations — Records.* Acts prescribing the mode of summoning juries in courts of the United States have no application to territorial courts, such courts not being "courts of the United States." In such courts the summoning should be in the manner prescribed by territorial statutes. *Clinton v. Englebrecht*, 13 Wal. 434.

2. Thus, Rev. Sts. § 808, which provides for the impanelling of grand juries and prescribes the number of which they shall consist, does not apply to territorial courts, but only to the federal circuit and district courts; and hence an indictment for bigamy under section 5352 may be found in a district court of Utah by a grand jury of fifteen persons, impanelled pursuant to the laws of that territory. *Reynolds v. United States*, 98 U. S. 145.

3. A court erected by the territorial legislature of Florida, to try and determine cases of salvage, held to be in conformity to the constitution and laws of the United States. *American Insurance Co. v. Canter*, 1 Pet. 511.

4. The citizens of the territory of Orleans might sue and be sued in the district court of that territory in the same cases in which a citizen of Kentucky might sue and be sued in the court of the district of Kentucky. *Sere v. Pitot*, 6 Cranch, 332.

5. A territorial court, held by judges whose appointments are for four years, cannot be the depository of any part of the judicial power conferred by the constitution on the federal government. *American Insurance Co. v. Canter*, 1 Pet. 511.

6. The jurisdiction of the courts established by congress in the territory of Florida ceased on the admission of that territory into the Union on March 3, 1845, as to matters both of state and of federal cognizance. *Benner v. Porter*, 9 How. 235; *Forsyth v. United States*, Id. 571.

7. In a territorial court, legal and equitable relief may be demanded in the same suit, if the organic act has declared simply that the courts shall possess both jurisdictions, without prescribing how, and the territorial assembly has so provided, as by the enactment of a code of practice. [CLIFFORD, DAVIS, and STRONG, JJ., dissenting.] *Hornbuckle v. Toombs*, 18 Wal. 648; *Davis v. Bilsland*, Id. 659.

8. So may a suit of equitable jurisdiction be tried by jury as an action at law, if the territorial statute so permit. [CLIFFORD, DAVIS, and STRONG, JJ., dissenting.] *Hershfield v. Griffith*, 18 Wal. 657.

9. Although by the organic act of Montana Territory jurisdiction at law and in equity is to be exercised by the same court, and by the territorial statutes the distinctions between those jurisdictions is abolished in pleading and procedure,

**TERRITORIAL COURTS**—*continued.*

the essential distinction between law and equity is not changed, and relief in equity must be applied by the court itself; and all information for its guidance obtained through the findings of a jury or otherwise is merely advisory, notwithstanding the statute of 1867, regulating proceedings in civil cases, which declares that issues of fact shall be tried by jury, unless a jury is waived. *Basey v. Gallagher*, 20 Wal. 670.

10. A territorial district court may exercise jurisdiction in admiralty, the organic act, like the act of March 2, 1853 (10 Sts. 152), establishing the government of Washington Territory, providing that these courts "shall exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States." *The City of Panama*, 101 U. S. 453.

11. Process from a district court of the territory of Idaho cannot be served on a defendant within territory reserved by treaty to an Indian tribe, the act of March 3, 1863 (12 Sts. 808), organizing the territory, providing that it shall not embrace in its jurisdiction any territory so reserved. *Harkness v. Hyde*, 98 U. S. 476. See *Langford v. Monteith*, 102 U. S. 145.

12. Where an Indian reservation within the geographical limits of a territory is excepted out of it only in respect to the territorial government, the district court of the territory within whose district it lies may exercise jurisdiction under federal laws over offences punishable thereunder committed within its limits. *Ex parte Crow Dog*, 109 U. S. 556.

13. After the admission of a state into the Union, a court of the state can exercise no control over the records of the territorial court of appeals, that court having been a federal court. *Hunt v. Palao*, 4 How. 589.

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*Powers of Territorial Legislatures.*

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**TERRITORIES**—*continued.*

1. — *Power of the General Government over Territories—Power of Congress to legislate for and concerning them—To what Territories the Power extends.* The general government has power to govern the territories; and congress, in legislating for them, exercises the combined powers of the federal and a state government. *American Insurance Co. v. Canter*, 1 Pet. 511.

2. Congress has the power to legislate directly for a territory, although, in the organic act, no such power is reserved. An act, therefore, which, like that of May 27, 1873 (17 Sts. 162), disapproves and annuls a territorial statute authorizing counties and townships to vote aid to railroads, except in the case of a certain specified railroad, makes valid subscriptions made and bonds issued by a county in aid of such railroad, without regard to the question of whether the territorial statute was passed at a time when the legislature was lawfully in session. *Brunswick First National Bank v. Yankton County*, 101 U. S. 129.

3. If a territory be admitted into the Union by an act which makes no provision for the disposal of causes pending in the supreme court on appeal or error, congress may supply the omission by a subsequent act. *Freeborn v. Smith*, 2 Wal. 160.

4. That clause of the constitution which confers on congress the power to "make all needful rules and regulations respecting the territory" of the United States, applies only to territory which belonged to or was claimed by the United States when the constitution was adopted, and not to territory since acquired from a foreign government. [McLEAN and CURTIS, JJ., dissenting.] *Scott v. Sandford* [*Dred Scott Case*], 19 How. 393.

5. Territory acquired by the United States to be admitted to the Union is held in trust for the benefit of the people of the United States, and congress is limited in the exercise of legislative power therein by all the restrictions which the constitution has imposed on that body relative to legislation on the rights of persons and to property, generally. [See McLEAN and CURTIS, JJ., dissenting.] *Ib.*

6. — *Powers of Territorial Legislatures.* The legislation of a territory, although subject, by its fundamental law, to the disapproval of congress, does not owe its effect primarily to any action of congress thereon, but is operative, until so disapproved, as legislation not of congress, but of the territory itself. *Miners' Bank v. Iowa*, 12 How. 1.

7. A territorial legislature is competent to pass an act authorizing judgment against the sureties on an appeal-bond as well as against the appellants, in case of affirmance; the organic act of the territory conferring power over all rightful subjects of legislation, and such an act being not unconstitutional. *Beall v. New Mexico*, 16 Wal. 535.

**TERRITORIES** — *continued.*

8. Where an act under which a territory is organized, as, *e. g.*, the organic act of Utah (9 Sts. 453), declares that the jurisdiction of the probate courts shall be "as limited by law," the territorial legislature, under its general power to legislate, cannot confer a general jurisdiction in criminal cases and civil, at chancery and common law, on the probate courts. The phrase "limited by law" must be deemed to mean limited by the general or common law defining the jurisdiction of these courts. *Ferris v. Higley*, 20 Wal. 375.

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[There is no inflexible rule determining whether the day from which a term is to be calculated shall be included in the computation. The courts will adopt such a construction as will confirm, and not overthrow, rights acquired in good faith by a fair transaction. *Griffith v. Bogert*, 18 How. 153.]

2. In general, where time is by the contract to be computed from a particular day, the day designated is excluded in the computation, and the last day of the specified period is included. *Sheets v. Selden*, 2 Wal. 177.

3. Where the priority of one legal right over another, depending on the order of events occurring on the same day, is involved, the rule that for most purposes the law regards the entire day as an indivisible unit is necessarily departed from. *Cincinnati First National Bank v. Burkhardt*, 100 U. S. 686.

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**TONNAGE DUTY** — *What is — What is not — State may not impose for Payment of Quarantine Expenses.]* A state statute requiring each vessel entering a port to pay a certain sum to the masters and wardens in addition to fees, whether called on for service or not, is a regulation of commerce and also a duty on tonnage, within

**TONNAGE DUTY** — *continued.*

the meaning of the constitution, and therefore unconstitutional. *Southern Steamship Co. v. New Orleans Port-wardens*, 6 Wal. 31.

2. So a state statute, *e. g.*, the Louisiana statute of March 6, 1869, making it the duty of the master and wardens of a port to survey or offer to survey the hatches of all sea-going vessels arriving at the port and the damaged goods on board, and prohibiting, under a penalty, any other person from so doing, is void, as being an attempt to regulate commerce. *Foster v. New Orleans Port-wardens*, 94 U. S. 246.

3. A municipal ordinance which, like that of New Orleans, demands of every steamboat mooring or landing in any part of the port a sum measured by its tonnage is a tonnage tax, and therefore void. *Cannon v. New Orleans*, 20 Wal. 577.

4. It is a tax for the privilege of stopping at the port, and cannot be justified on the ground that it is intended as compensation for the use of wharves built by the city. *Ib.*

5. A tax on vessels at so much "per ton of the registered tonnage" is a duty on tonnage such as by the constitution a state cannot lay without the consent of congress; and this, although the vessels are owned by citizens of the state, and exclusively engaged in trade between places within the state. *Cox v. Collector [State Tonnage Tax Cases]*, 12 Wal. 204.

6. A state statute, *e. g.*, the New York statute of May 22, 1862, as amended April 7, 1865, which requires vessels entering a port to load or unload, or making fast to any wharf therein, to pay a certain percentage per ton, computed on the registered tonnage, is so far void, as being an unlawful attempt by a state to impose a tonnage duty. *Inman Steamship Co. v. Tinker*, 94 U. S. 238.

7. The imposition by a municipal corporation having an exclusive right to make wharves along its river front, and to collect and regulate wharfage, of a charge for wharfage proportioned to tonnage, against the owners of steamboats landing at wharves which it has constructed, is not unconstitutional as a duty on tonnage, nor as a regulation of commerce, nor for any reason. *Packet Co. v. Keokuk*, 95 U. S. 80; *Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, 100 U. S. 430; *Cincinnati, Portsmouth, Big Sandy, & Pomeroy Packet Co. v. Callettsburg*, 105 U. S. 559.

8. *Semble*, that if it were apparent that the charge exacted were extortionate, equity might relieve. *Cincinnati, Portsmouth, Big Sandy, & Pomeroy Packet Co. v. Callettsburg*, 105 U. S. 559.

9. A municipal license-fee levied, not on ferry-boats, but on their keepers, and levied the same amount for each boat kept, whatever its size, cannot be deemed to impose a tax on tonnage, although the boats have been enrolled, inspected, and licensed under the laws of the United States.

**TONNAGE DUTY** — *continued.*

*Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

10. An ordinance passed by a city on a navigable river which authorizes the city to exact wharfage of vessels "that may discharge or receive freight, or land on or anchor at or in front of any wharf," etc., belonging to the city, is not unlawful as laying a duty on tonnage; and it makes no difference that the charge is exorbitant, nor that it is graduated by the tonnage of the vessel. Whether a duty of tonnage or a wharfage charge, is to be determined by the terms of the ordinance, not by the intent. [HARLAN, J., dissenting.] *Transportation Co. v. Parkersburg*, 107 U. S. 691.

11. In the absence of federal legislation, a circuit court cannot interfere to restrain the collection of exorbitant wharfage charges under a municipal ordinance. Although a wharf is an instrument of commerce, where congress has not acted in the matter, such charges are subject to local regulation; and a person aggrieved must seek his remedy under the local law. *Ib.*

12. A state cannot impose a tonnage tax in order to defray quarantine expenses. *Peete v. Morgan*, 19 Wal. 581.

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1. — *Subject of Trademark — Right of Assignment — Remedy for Infringement.*] One cannot acquire a right as to a trademark in the name of a district of country, coupled with the generic name of a well-known article of commerce, produce of that district, as, for instance, in the term "Lackawanna coal," so as to have a right to enjoin others dealing in a like article, produce of that district, from using that name; and it makes no difference, the name in such case being truthfully applied, that a purchaser would suppose the article to have come from the original user of the name. *Delaware & Hudson Canal Co. v. Clark*, 13 Wal. 311.

2. Letters or figures affixed to merchandise for the purpose of denoting its quality only, cannot be appropriated by the manufacturer as a trademark. *Amoskeag Manufacturing Co. v. Trainer*, 101 U. S. 51.

3. The resemblance necessary to infringement of a trademark is such only as would be likely to lead purchasers exercising ordinary caution into purchasing the one article, supposing it to be the other. *McLean v. Fleming*, 96 U. S. 245.

4. The owner of a trademark affixed to articles manufactured at his establishment, in selling those articles may transfer therewith to the purchaser the right to use the trademark. *Kidd v. Johnson*, 100 U. S. 617.

5. Where a manufacturer has habitually stamped his goods with a particular mark or brand, equity will restrain another from using it for the same

**TRADEMARK — continued.**

kind of goods. *McLean v. Fleming*, 96 U. S. 245.

6. Equity will extend no aid to sustain a claim to a trademark of an article put forth with a misrepresentation as to the manufacturer of the article and as to the place where it is manufactured, both of those particulars having originally been circumstances to guide the purchaser. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218.

7. Although an injunction against the further infringement of a trademark is granted, the plaintiff's laches in seeking relief may preclude him from claiming damages. *McLean v. Fleming*, 93 U. S. 245.

8. — *Unconstitutionality of Trademark Legislation of 1870 and 1876.* [The trademark legislation embraced in the act of July 8, 1870 (16 Sts. 198), and the act of August 14, 1876 (19 Sts. 141), which provide for the protection of trademarks registered at the patent office, is unconstitutional. It cannot be sustained under the power of congress to secure to authors and inventors the exclusive right to their writings and discoveries; as it is not an invention, nor a discovery, nor a writing, within the meaning of the constitution. Nor can it be sustained under the power to regulate commerce, as it is not limited to commerce with foreign nations, etc., but applies to all commerce. *United States v. Steffens* [Trademark Cases], 100 U. S. 82.]

9. *Quære*, whether it would be otherwise under the power to regulate commerce, if restricted in its application to the kinds of commerce that are within congressional control, — whether, i. e., it bears the requisite relation to commerce. *Ib.*

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*Under Various Statutes — Right of Government to impose Conditions, as by the Act of 1861 — License.*

See pl. 13-36.

*Remission of Forfeitures by the Secretary of the Treasury.*

See pl. 37, 38.

1. — *In general — Commercial Intercourse, whether direct or through an Agent, prohibited — Effect of License — Power of the President to license.* [Intercourse during war with an enemy is unlawful, where the enemy stands in the relation of debtor, not less than where he does not. *United States v. Grossmayer*, 9 Wal. 72; *Jecker v. Montgomery*, 18 How. 110.]

2. If, in any case, a creditor may have an agent in the enemy's country, to whom his debtor there may pay a debt contracted before the war, he must be an agent appointed before the war. *Ib.*

**TRADING WITH ENEMY — continued.**

3. In general, a citizen of a state at war cannot enter into a contract with a citizen of the hostile state. *Scholefield v. Eichelberger*, 7 Pet. 586.

4. Trading with an enemy does not *ipso facto* forfeit the property, but only renders it liable to condemnation when regularly captured. *The Thomas Gibbons*, 8 Cranch, 421.

5. Under the rule which avoids all commercial transactions with a public enemy, whether direct or through the intervention of an agent, a sale of crops within the confederacy, the property of a planter there domiciled, made at New Orleans after the occupation of the city by the federal forces, by the planter's agent, a loyal citizen there domiciled, to a British subject also there domiciled, is void, the crops being described as the property of the planter; and this, although the seller had long been the agent of the planter, had been accustomed to make advances on the security of the crops, and had made advances on the crops so sold to more than their value. *Montgomery v. United States*, 15 Wal. 395.

6. Purchases of cotton, made in the interior of Louisiana and within the rebel lines, after the occupation of New Orleans by the federal forces, by an agent of a New Orleans firm sent out for the purpose of collecting money due to the firm there and of making such purchases when the entire state was completely under rebel control, were a trading with the enemy, and conferred no title on the principals. [MILLER and FIELD, JJ., dissenting.] *United States v. Lapène*, 17 Wal. 601.

7. Whether, in general, a belligerent may withdraw from the enemy's country goods purchased and paid for before the beginning of hostilities, or not, he should have the benefit of the time allowed for the withdrawal of all vessels with or without cargo. *The Crenshaw*, 2 Black, 635.

8. If one enter an enemy's country in train of a military expedition, by permission of the commander, and with the sanction of the executive department, his property will not be liable to seizure merely because he has so traded. *Mitchell v. Harmony*, 13 How. 115.

9. Nor on a mere unfounded rumor or suspicion of an intention to quit the expedition and join the enemy. *Ib.*

10. After a declaration of war, an American citizen cannot lawfully send a vessel to the enemy's country, to bring away his property, intercourse, and not merely trading, being forbidden. *The Rapin*, 8 Cranch, 155.

11. Hostile trade is not excused by the necessity of obtaining funds to pay the expenses of the ship. *The Joseph*, 8 Cranch, 451.

12. *Quære*, whether, notwithstanding the repeal of section 5 of the act of July 13, 1861, authorizing the president, in his discretion, to license or permit commercial relations in any state or section in insurrection, he could not, in virtue of his power as commander-in-chief of the army, license

**TRADING WITH ENEMY — continued.**

trade with insurgents within the lines of confederate military occupancy. *Walker v. United States*, 106 U. S. 413.

13. — *Under Various Statutes — Right of Government to impose Conditions, as by the Act of 1861 — License.*] The government, in time of war, may impose such conditions on commercial intercourse with the enemy as it sees fit; such, *e. g.*, as it did by the act of July 13, 1861 (12 Sts. 257), prohibiting commercial intercourse with the insurrectionary states, but providing that the president, in his discretion, might license and permit it in such articles, for such time, and by such persons, as he might think conducive to the public interest, to be conducted only in pursuance of rules prescribed by the secretary of the treasury, and regulations thereunder imposing a charge of four cents per pound on cotton purchased in and brought from an insurrectionary state. *Hamilton v. Dillin*, 21 Wal. 73.

14. It was no objection to such charge that it covered cotton purchased in that part of an insurrectionary state which was in fact, at the time, within the federal lines. *Ib.*

15. The validity of the charge was recognized by the act of July 2, 1864 (13 Sts. 375), wherein congress directed that fees collected under the regulations made as aforesaid should be paid into the treasury. *Ib.*

16. The act of 1861, forbidding commercial intercourse with the citizens of such parts of the United States as the president might declare to be in a state of insurrection, during the continuance of hostilities, was not a temporary act; and it remained in force after the cessation of hostilities for the enforcement of forfeitures already incurred thereunder. *The Reform*, 3 Wal. 617.

17. The act of 1861, and the president's proclamation under it, making unlawful all commercial intercourse between citizens of states or parts of states in insurrection and citizens of other parts of the United States, rendered void all unlicensed purchases of cotton from the confederacy by citizens of New Orleans after the re-establishment of the national authority there on May 6, 1862. *United States v. Ouachita Cotton*, 6 Wal. 521; *McKee v. United States*, 8 Wal. 163.

18. A purchaser from a citizen of New Orleans who had purchased from the confederacy after that date took no valid title, although himself a foreign neutral and a *bona fide* purchaser for value. *United States v. Ouachita Cotton*, 6 Wal. 521.

19. A license of such purchases given by the military authorities was a mere nullity, no one but the president having any authority under that act to issue one. *Ib.*; *McKee v. United States*, 8 Wal. 163.

20. Under that act the president alone had power to license commercial intercourse with places under the control of the insurgents. The general orders of a commander of a military

**TRADING WITH ENEMY — continued.**

department could give it no validity. *Coppell v. Hall*, 7 Wal. 542.

21. A license issued in conformity to that act would be no authority to purchase of any person holding an office or agency under the confederate government, sales by such persons being void under the act of July 17, 1862 (12 Sts. 590). *McKee v. United States*, 8 Wal. 163.

22. A permit granted under the act of 1861, and the regulations of the treasury department thereunder, to trade in a certain locality, is evidence *prima facie* that the locality was properly within the trade regulations of that department. *United States v. Weed*, 5 Wal. 62.

23. A treasury permit to a firm to buy cotton in territory evacuated by the confederate forces, authorized them to buy through their agent. *Butler v. Maples*, 9 Wal. 766.

24. The act of February 13, 1862 (12 Sts. 335), making an appropriation for the purchase of cotton seed "under the superintendence of the secretary of the interior," did not empower the secretary to authorize the transportation of goods, to barter therefor, to a district declared to be in insurrection and intercourse with which was prohibited, except as it might be permitted by the president pursuant to rules prescribed by the secretary of the treasury. *The Reform*, 3 Wal. 617.

25. And a letter from the secretary giving authority merely to "procure a cargo" of such seed in such a district, and "bring it to" a place not within the prohibition, was not a license to that effect. *Ib.*

26. Section 8 of the act of 1864, providing that the secretary of the treasury, with the approval of the president, might authorize agents to purchase for the United States any products of the states in insurrection, at such places as he might designate, did not confer power to license trading within the military lines of the enemy. *United States v. Lane*, 8 Wal. 185; *Maddox v. United States*, 15 Wal. 58.

27. The extent of the privileges conferred by and under that act, stated. *Ib.*

28. Where, under the authority conferred by section 8 of that act, permitting the purchase by treasury agents of products of the insurrectionary states at prices not exceeding three fourths of the market value in New York, cotton was brought by the owners from a place west of the Mississippi to New Orleans, and there taken possession of by a treasury agent June 6, 1865, and released to the owners only on their payment of one fourth the New York market value, payment being made in part June 12 and in part June 15, the president, by proclamation of June 13, removing restrictions on trade east of the Mississippi, and by proclamation of June 24 restrictions on trade west of the Mississippi, it was held that the payment was properly exacted, the rights of the parties on June 6 being in no way affected by the subsequent proclamations,



**TRADING WITH ENEMY — continued.**

and the time of payment having no bearing on the case. *Cutler v. Kouns*, 110 U. S. 720.

29. The act of May 20, 1862 (12 Sts. 404), authorizing the secretary of the treasury to prohibit the transportation of "any goods, wares, or merchandise," where there was reason to suspect a rebel destination, and to make regulations, etc., authorized a regulation forbidding the transportation of coin or bullion; and the act and the regulation together authorized the seizure in 1864 of gold coin in packages and not used for travelling expenses, gold coin then being an article of merchandise. *Gay v. United States*, 13 Wal. 358.

30. Section 3 of that act, authorizing the secretary of the treasury to require reasonable security that goods shall not be transported in vessels to any place under insurrectionary control, nor be used in giving aid or comfort to the enemy, and to establish regulations necessary and proper to carry the act into effect, confers on the collector of a port, under regulations established by the secretary, the right to exact a bond with two sureties, in double the value of the goods. The right of the collector to refuse a clearance altogether includes the right to exact such a bond, which, when duly executed, is *prima facie* presumed to have been voluntarily entered into. *United States v. Mora*, 97 U. S. 413.

31. A purchase of cotton made by a resident of Memphis, then in Mobile, on the day of the capture of the latter city by the United States forces, from one then within the confederate lines, who himself had purchased it from the confederate government, was illegal, and gave to the purchaser no right to the proceeds of the cotton, seized afterwards by treasury agents and sold, the acts prohibiting commercial intercourse between residents of those parts of insurrectionary states within the federal military lines then being in force. *Walker v. United States*, 106 U. S. 413.

32. Nor could the purchase be justified under an executive order made in reference to products of the insurrectionary states then owned by the purchaser, or concerning which he then had arrangements with other parties, he neither owning nor having arrangements concerning the cotton in controversy at the time of the issue of the order. *Ib.*

33. Commercial intercourse between the inhabitants of the states in rebellion and those of other parts of the United States did not become unlawful until the issue of the proclamation of August 16, 1861; and hence a partnership, of which one member resided in New York and the others in Louisiana, was not dissolved by the war as early as April 23, 1861, although a state of war then existed. *Matthews v. McStea*, 91 U. S. 7.

34. All restrictions on commercial intercourse between Tennessee and New Orleans were re-

**TRADING WITH ENEMY — continued.**

moved by the executive order of April 29, 1865 (13 Sts. 776). Neither the rights nor the duties of the holder of a bill drawn in Tennessee, and which matured in New Orleans before June 13, 1865, were dependent on or affected by the president's proclamation of that date. *Bond v. Moore*, 93 U. S. 593.

35. The charge of four cents per pound on cotton purchased in and brought from an insurrectionary state, authorized by the act of July 13, 1861 (12 Sts. 257), and the license of the president pursuant thereto, was not a tax, but a bonus required as a condition precedent to engaging in such trade, and a legitimate exercise of the war power. *Hamilton v. Dillin*, 21 Wal. 73.

36. The driving of fat cattle on foot is not a transportation thereof within the meaning of the act of July 6, 1812 (2 Sts. 778), prohibiting trade with public enemies. *United States v. Sheldon*, 2 Wheat. 119.

37. — *Remission of Forfeitures by the Secretary of the Treasury.* A remission by the secretary of the treasury of a forfeiture under the act of July 13, 1861 (12 Sts. 255), providing for the forfeiture of goods coming from states in insurrection, did not extend to a case where the vessel and cargo were proceeding from a rebel to a foreign or neutral port. *The Gray Jacket*, 5 Wal. 342.

38. Under that statute the secretary had no power to remit a forfeiture in any case of property captured as maritime prize of war. *Ib.*

**Embargo and Non-intercourse.**

See EMBARGO.

**Insurance as affected by — Exception in Policy.**

See INSURANCE — MARINE, 61 *et seq.*

**License from Treasury Agent.**

See BLOCKADE, 39.

**What constitutes, etc. — In general.**

See CONTRABAND; DOMICILE, 9, 10.

**What is such Trading as will defeat a Claim for Proceeds of Abandoned and Captured Property.**

See ABANDONED AND CAPTURED PROPERTY, 14-18.

**TRANSCRIPT — Record on Appeal or Error.**

See APPEAL AND ERROR.

**Treasury, as Matter of Evidence.**

See RECEIVER OF PUBLIC MONEY, 46 *et seq.*

**TRANSFER OF CAUSES — From one Federal Court to another.**

See FEDERAL COURTS — PRACTICE, 55 *et seq.*

**Transfer of Causes — From a State to a Federal Court.**

See REMOVAL OF CAUSES.

**TREASON** — *What constitutes — Effect — Admission of Prisoner to Bail.* Where one who is bound by allegiance to a government sells goods to an agent of an armed combination to overthrow that government, knowing that they are bought for that treasonable purpose, he is guilty of treason or a misprision thereof. *Carlisle v. United States*, 16 Wal. 147.

2. A conspiracy to subvert the government by force is not treason. An actual levy of war is necessary to the commission of that crime. But if a body of men be actually assembled for the purpose of effecting by force a treasonable design, all who perform any part, however minute, and however remote from the scene of action, and who are actually leagued in the general conspiracy, are guilty of treason. *Ex parte Bollman*, 4 Cranch, 75.

3. That one has been guilty of treason does not preclude him from recovering damages from others guilty of a like offence for a malicious arrest and imprisonment by virtue of a judgment of a confederate court for an alleged treason to the confederacy. *Hickman v. Jones*, 9 Wal. 197.

4. A prisoner committed by the judge of a district court on a charge of treason, admitted to bail. *United States v. Hamilton*, 3 Dal. 17.

*Prosecution therefor to Confederate Court a Nullity.*

See CONFEDERACY, 3.

*Meaning in Constitutional Provision respecting Extradition.*

See EXTRADITION, 3.

**TREASURY DEPARTMENT** — *Powers of the Secretary — Of the Comptroller — Commissioner of Internal Revenue — Auditor — Compensation of Assistant Treasurer.* Under the act of January 31, 1823, § 1 (3 Sts. 723), prohibiting the advancing of public money, "except under the special direction of the president," the secretary of the treasury, under instruction from the president, may lawfully make necessary advances to a marshal, as such duties can be performed by the president only through the agency of the appropriate departments. *Williams v. United States*, 1 How. 290.

2. The secretary of the treasury has authority to employ an agent to purchase supplies for the light-house service, and to disburse money in payment therefor. *Converse v. United States*, 21 How. 463.

3. He has no authority under existing legislation, and without further direction from congress, to use the surplus revenue in the treasury for the purpose of making the fourth instalment of deposit according to act June 23, 1836 (5 Sts. 55). *Ex parte Virginia*, 111 U. S. 43.

4. Under an act directing the secretary of the treasury to refund to certain persons named the amount of taxes collected from them, an amount being set opposite the name of each, neither the

**TREASURY DEPARTMENT** — *continued.*

secretary nor the accounting officers of the treasury, nor the courts, have authority to determine whether the amounts named were in fact the amounts assessed and collected. *United States v. Jordan*, 113 U. S. 418.

5. The transmission of money by the secretary of the navy to a naval officer, for disbursement, is an act which the comptroller of the treasury has no power so to revise as to charge the officer with the sum transmitted, although the money was disbursed in payment for medical attendance on the officer abroad for injuries received by him while abroad on leave of absence. [CATRON and DANIEL, JJ., dissenting.] *United States v. Jones*, 18 How. 92.

6. It is doubted whether the comptroller of the currency has a right to submit himself to the control of the courts in the discharge of duties specially intrusted to him by law, at least of courts which can assert no such jurisdiction by reason of territorial limits. *Case v. Terrell*, 11 Wal. 199.

7. Where the commissioner of internal revenue orders a collector to give a new bond, the bond given being defective in form, such order has the force of one emanating directly from the secretary of the treasury. *Soule v. United States*, 100 U. S. 8.

8. The duty of auditing the accounts of collectors of internal revenue devolves upon the fifth auditor of the treasury department. *Ib.*

9. An assistant treasurer of the United States to whom, without prepayment therefor, the commissioner of internal revenue furnishes for sale and distribution sealed packages of adhesive stamps, is not entitled to commissions or extra compensation for selling them. [FIELD and BRADLEY, JJ., dissenting.] *Folger v. United States*, 103 U. S. 30.

*Account stated — Treasury Transcript — Form — Effect, etc.*

See RECEIVER OF PUBLIC MONEY, 46 *et seq.*

*Agent — Authority of Treasury Agent under Abandoned and Captured Property Acts.*

See ABANDONED AND CAPTURED PROPERTY, 24.

*Construction of Statutes affecting Business.*

See STATUTES — CONSTRUCTION, 38.

*District Court — Power to enjoin Execution.*

See INJUNCTION, 3.

*Distress Warrant — Issue lawful — Due Process, etc. — Not Search Warrant.*

See RECEIVER OF PUBLIC MONEY, 19-22.

*Distress Warrant — Return — Evidence of what.*

See WRIT AND PROCESS, 19.

*Regulation of Trade with the Enemy — Rebellion — Purchases by Treasury Agents.*

See TRADING WITH ENEMY, 13 *et seq.*

**TREASURY DEPARTMENT** — *continued.*

*Secretary* — *Appeal to, from Decisions of Customs Officers.*

See DUTIES — ASSESSMENT, 25 *et seq.*

*Secretary* — *Certain Powers relative to Public Lands.*

See LANDS OF UNITED STATES — LAND OFFICE, 5, 6, 10.

*Secretary* — *Exercise of Authority* — *Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 113.

*Secretary having abated Internal Revenue Tax, cannot, by recalling his Decision, restore Liability of Sureties on Bond.*

See INTERNAL REVENUE — PERSONS AND THINGS TAXED, 43.

*Secretary* — *Mandamus to compel Payment of a Public Debt* — *Salary of Territorial Judge, etc.*

See MANDAMUS, 21, 23, 25.

*Secretary* — *Power to remit Forfeitures for Trading with Enemy.*

See TRADING WITH ENEMY, 37, 38.

*Secretary* — *Power to remit Penalties or Forfeitures under Revenue Laws until Money is paid over, etc.* — *Discretion.*

See INTERNAL REVENUE — PENALTIES AND FORFEITURES, 5-7.

*Secretary* — *Power under Rev. Sts. § 2505, by Way of Regulation to limit Scope of the Act.*

See DUTIES — CLASSIFICATION, 56.

*Secretary* — *Remission of Forfeiture* — *Pleading.*

See PLEADING — PLEA TO MERITS, 6.

*Secretary* — *Remission of Penalties and Forfeitures* — *Not Interference with Pardoning Power.*

See SHIPPING — REGULATION, 29.

*Solicitor* — *Power, relative to Public Lands* — *Sales.*

See LANDS OF UNITED STATES — DISPOSAL, 7.

*Treasurer* — *Bill indorsed to Treasurer presumed to have been taken in Lawful Discharge of Duty.*

See UNITED STATES — SUITS, 3.

**TREASURY NOTES** — *In general.*

See GOVERNMENT BONDS.

**TREATY** — *In general* — *Effect of War on Treaty.*

See pl. 1-12.

*France* — *Construction of Treaties with.*

See pl. 13-15.

*Great Britain* — *Construction of Treaties with.*

See pl. 16-22.

*Mexico* — *Construction of Treaties with.*

See pl. 23-25.

**TREATY** — *continued.*

*Spain* — *Construction of Treaties with.*

See pl. 26-39.

*Wurtemberg* — *Construction of Treaty with.*

See pl. 40.

**1. — In general** — *Effect of War on Treaty.*

If a treaty conflicts with state laws or constitutions, the latter must give way. The federal constitution declares that treaties "shall be the supreme law of the land, . . . anything in the constitution or laws of any state to the contrary notwithstanding." *Hauenstein v. Lynham*, 100 U. S. 483.

**2.** A treaty stipulation that the inhabitants of ceded territory shall be protected in their property, is but an assertion of a principle of natural justice, which should be held sacred without such a stipulation. *Soulard v. United States*, 4 Pet. 511; *Delassus v. United States*, 9 Pet. 117; *Mitchel v. United States*, 9 Pet. 711; *United States v. Moreno*, 1 Wal. 400.

**3.** A treaty with an Indian tribe, so far as it can become the subject of judicial cognizance, is subject to such acts as congress may pass for its modification or repeal. *Cherokee Tobacco*, 11 Wal. 616.

**4.** So is a treaty with a foreign nation. *Edye v. Robertson* [*Head-money Cases*], 112 U. S. 580.

**5.** A treaty, although binding on the parties as of its date, operates on vested individual rights as of the date of ratification. *Hacer v. Yaker*, 9 Wal. 32.

**6.** Where a country is ceded by treaty, its laws, whether written or resting in custom, continue in force until altered by the new sovereign. *Strother v. Lucas*, 12 Pet. 410.

**7.** A treaty which merely stipulates for future legislation, addresses itself to the political and not to the judicial department; and the latter must await action by the former. *Foster v. Neilson*, 2 Pet. 253.

**8.** After the signing of a treaty of cession, the ceding power has no authority to make a grant of land within the territory ceded. *Davis v. Concordia Parish*, 9 How. 280; *United States v. Pillerin*, 13 How. 9; *United States v. Rillieux*, 14 How. 159; *United States v. Gusman*, 14 How. 193; *United States v. Ducros*, 15 How. 39.

**9.** The original of the Spanish treaty of February 22, 1819 (8 Sts. 252), in the Spanish language, not corresponding precisely with the original in English, the language of the former was held to be taken as expressing the meaning of Spain, the grantor, as to lands granted and reserved. [THOMPSON, J., dissenting.] *United States v. Arredondo*, 6 Pet. 691. See *United States v. Percheman*, 7 Pet. 51.

**10.** The rules that neutral bottoms make neutral goods, and that enemy's bottoms make enemy's goods, though often associated, are not inseparable. Therefore, from a treaty stipulation for the former an adoption of the latter cannot arise by implication. *The Nereide*, 9 Cranch, 388.

**TREATY — continued.**

11. The termination of a treaty by war does not divest rights to property already vested thereunder. *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. 464.

12. Nor do treaties, in general, become extinguished, *ipso facto*, by war between the parties: those that stipulate for a permanent arrangement of territorial and other national rights are, at most, but suspended during the war, and revive on the return of peace, if not waived by the parties, or if new and repugnant stipulations be not made. *Ib.*

13. — *France — Construction of Treaties with.*] Under article 19 of the treaty of February 6, 1778 (8 Sts. 12), between the United States and France, a French privateer has a right to make repairs in the ports of the United States. *Moodie v. The Phoebe Anne*, 3 Dal. 319. And see *Geyer v. Michel*, 3 Dal. 285.

14. The decision of the board of commissioners created by act of congress under the French treaty of July 4, 1831 (4 Sts. 574), as to the rights of conflicting claimants, held not conclusive, but to leave the question fully open to the courts. *Frevall v. Bache*, 14 Pet. 95.

15. That part of article 7 of the treaty of 1853 which provided that French citizens should be subjected to no taxes on inheritances in this country, other than such as might be imposed on citizens of the United States, had no application to rights of inheritance previously fixed by death of the ancestor, as in such cases the rights to the taxes had already vested. *Prevost v. Greneaux*, 19 How. 1.

16. — *Great Britain — Construction of Treaties with.*] The fourth article of the British treaty of peace of September 3, 1783 (8 Sts. 80), enabled British creditors to recover debts previously contracted by citizens of the United States, notwithstanding payment thereof during the war into a state treasury under a state law of sequestration. *Ware v. Hylton*, 3 Dal. 199.

17. The "interest in lands by debts," intended to be protected by article 5 of that treaty, is an interest held as security for money at the time of the treaty. *Owings v. Norwood*, 5 Cranch, 344.

18. The treaty saved liens on land for debts owing to British subjects before the revolutionary war. *Higginson v. Mein*, 4 Cranch, 415.

19. A defeasible title vested during the war of the revolution, in a British-born subject who never became a citizen, was completely confirmed by the treaty of 1794 (8 Sts. 116). *Craig v. Radford*, 3 Wheat. 594.

20. The treaties of 1783 and 1794 (8 Sts. 80, 116), provided for existing titles only. *Blight v. Rochester*, 7 Wheat. 535.

21. The rights of a British mortgagee were protected by the treaty of 1794. *Hughes v. Edwards*, 9 Wheat. 489.

22. Under the treaty of 1783, the United States succeeded to all the rights of France in the territory now the state of Michigan, which ex-

**TREATY — continued.**

isted at its conquest by the British in 1760, including the right to deal with seigniorial estates for a forfeiture, for non-performance of the conditions of the fief. *United States v. Repentigny*, 5 Wal. 211.

23. — *Mexico — Construction of Treaties with.*] Although the award of commissioners under the act of March 3, 1849 (9 Sts. 393), passed to carry into effect the convention between the United States and Mexico, does not finally settle the equitable rights of third persons, it gives a legal title to the person thereby recognized as the owner of the claim; and if he also has an equal equity, his legal title cannot be disturbed. *Judson v. Corcoran*, 17 How. 612.

24. Section 8 of the treaty of Guadalupe Hidalgo (9 Sts. 923), providing for the protection of the rights of property of Mexican citizens, did not protect their rights to property in Texas, that section having reference only to territory acquired by the United States under the treaty. *McKinney v. Saviego*, 18 How. 235.

25. Where money was claimed under the act of 1849, § 8, to carry into effect certain stipulations between the United States and Mexico, by a creditor of a bankrupt whose assignee was dead, a bill by the claimant in behalf of himself and all other creditors, filed within the time required by that section, and to which the new assignee, when appointed, made himself a party, was held to be in compliance with that act, and within the jurisdiction of the circuit court for the District of Columbia. *Clark v. Clark*, 17 How. 315.

26. — *Spain — Construction of Treaties with.*] Under the Spanish treaty of 1795 (8 Sts. 138), stipulating that free ships shall make free goods, the want of a sea-letter or passport, or of certificates as to the cargo and the port of departure, is not good ground for condemnation, but only authorizes capture and taking in for adjudication. *The Pizarro*, 2 Wheat. 227.

27. The term "subjects" in article 15 of that treaty is not restricted to those who owe permanent allegiance to the Spanish government, but extends to all persons domiciled in the Spanish dominions. *Ib.*

28. Under that treaty, the Spanish character of the vessel being ascertained, the character of the cargo cannot be inquired into, except to ascertain that it does not belong to American citizens, whose property engaged in trade with the enemy the treaty does not protect. *Ib.*

29. Article 17 of that treaty is imperfect and inoperative so far as it purports to give effect to passports, because of the omission to annex the form of passport as provided by that article. *The Amiable Isabella*, 6 Wheat. 1.

30. Thus, notwithstanding the provision that free ships shall make free goods, the proprietary interest in the ship must be proved according to the ordinary rules of the prize court, and, that being proved to be Spanish, the cargo will be protected. *Ib.*

**TREATY — continued.**

31. The treaty prohibits American citizens from taking commissions to cruise against Spanish vessels in a privateer, but not in a public armed vessel of a belligerent nation. *The Santissima Trinidad*, 7 Wheat. 283.

32. To bring a case within article 9 of the treaty of 1819 (8 Sts. 252), providing for the restoration of property rescued from pirates and robbers on the high seas, it is necessary to show that what is claimed comes within the description of vessel or merchandise, that it has been rescued on the high seas from pirates and robbers, and that the asserted proprietors are the true proprietors. *The Amistad*, 15 Pet. 518.

33. Native Africans, unlawfully kidnapped and imported into a Spanish colony contrary to the laws of Spain are not merchandise within the meaning of that article; nor can any one show that he is entitled to them as their proprietor; nor are they pirates or robbers, if they rise and kill the master and take possession of the vessel in which they are being transported, for the purpose of regaining their liberty. *Ib.*

34. Native Africans, unlawfully detained on board a Spanish vessel, are not bound by a treaty between the United States and Spain, but may, as foreigners to both countries, assert their right to their liberty in our courts. *Ib.*

35. The claims of American citizens against Spain for which, by the convention of February 22, 1819, the United States undertook to make satisfaction, and on which the commissioners subsequently appointed on ratification of the treaty (8 Sts. 252) had power to pass, were such only as at that date were unliquidated, and instalments of which had been presented to the department of state or to the American minister. *Meade v. United States*, 9 Wal. 691.

36. The notice given to Spain on August 21, 1819, that on the expiration, without a ratification of the convention, of the six months allowed by the convention therefor, all claims of the United States would stand as if the convention had not been made, did not, by reason of non-ratification within that time, make revocable the power which citizens of the United States by filing their claims had given the government to make reclamation against Spain in their behalf. *Ib.*

37. The American minister had no authority by virtue of his office to assure the Spanish government that if the convention were ratified a certain liquidated claim would be paid, and such an assurance was void. *Ib.*

38. A decision by the board of commissioners dismissing the claim as presented was a bar to a recovery in the court of claims; and the bar was not waived by a reference of the case to that court by congress, after the court had once decided adversely to the claimant. *Ib.*

39. The commissioners had power to decide conclusively on the amount and validity of claims, but not on the conflicting rights of parties to

**TREATY — continued.**

the sums awarded. *Comegys v. Vasse*, 1 Pet. 193.

40. — *Wurtemberg — Construction of Treaty with.*] That provision of the treaty with Wurtemberg of April 10, 1844 (8 Sts. 588), which declares that citizens or subjects of each country may dispose of personal property in the other by will or otherwise, and that their legatees, being citizens or subjects of the other country, shall succeed thereto, and may take possession thereof, etc., at their pleasure, "paying such duties as the inhabitants of the country where the property lies shall be liable to pay in like cases," does not conflict with the right of a state to impose a succession duty on legacies given by its naturalized citizens, though natives of Wurtemberg, to citizens of Wurtemberg. *Frederickson v. Louisiana*, 23 How. 445.

*Alienage as affected by Treaty with Swiss Confederation.*

See ALIEN, 30.

*Alienage as affected by Treaty with France.*

See ALIEN, 20-23.

*Alienage as affected by Treaties with Great Britain.*

See ALIEN, 19 et seq.

*British Treaties — Effect on Corporations.*

See CORPORATION — FOREIGN, 21, 22.

*China — November 17, 1880 — Regulation of Immigration.*

See CHINESE LABORERS.

*Claims under Treaties not within General Jurisdiction of Court of Claims.*

See COURT OF CLAIMS — JURISDICTION, 23 et seq.

*Construction — Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 115, 116.

*Great Britain, 1783 — Limitations — Time previous to Revolution.*

See LIMITATION — EXCEPTIONS AND INTERRUPTIONS, 67.

*Indian Treaties — In general.*

See INDIANS, 33, 37 et seq.

*Louisiana — Cession by France — When it took effect — Construction.*

See LOUISIANA, 1, 2.

*Mexico — Claims Commission.*

See PRESIDENT, 4.

*Necessary to enable Alien to inherit.*

See ALIEN, 19, 29.

*Ottoman Empire — Concession to United States of Right to Consular Courts.*

See CONSULAR COURTS.

*Portugal — Treaty of 1840 — Effect on Right to impose Discriminating Duties in Certain Cases.*

See DUTIES — CLASSIFICATION, 72.

**TREATY** — continued.

*Postal Treaty of 1874 with Berne prohibits Introduction of Dutiable Articles by Mail.*

See DUTIES — PENALTIES AND FORFEITURES, 14.

*Power of Government to acquire Territory.*

See UNITED STATES — IN GENERAL, 7 et seq.

*Spain — France — Treaties ceding the Floridas, Louisiana, California, etc. — Construction, Effect, etc.*

See LANDS OF UNITED STATES — GRANTS FROM FORMER GOVERNMENTS.

**TRESPASS** — In general — *Trespass to try Title — Trespass for Mesne Profits.* The importer of goods has constructively such possession thereof that, after he has duly offered to enter the goods and pay the duties, he may maintain trespass for a wrongful taking thereof. *Conard v. Pacific Insurance Co.*, 6 Pet. 262.

2. If the plaintiff in an attachment give to the officer a bond of indemnity, to induce him after levy to hold the goods of a stranger to the writ, he thereby becomes a joint trespasser with the officer as to all that is done with the goods afterwards. *Lovejoy v. Murray*, 3 Wal. 1.

3. In trespass *de bonis asportatis*, which is a transitory action, it is not necessary to lay the true venue, but only the venue of the place of trial under a *videlicet*. *McKenna v. Fisk*, 1 How. 241.

4. In an action of trespass *de bonis asportatis*, where the issue is on the plaintiff's ownership of the property, evidence tending directly to prove that an alleged sale on which the plaintiff relied was fraudulent is pertinent to the issue and should be admitted. *Deutsch v. Wiggins*, 15 Wal. 539.

5. In trespass against several defendants, the court will not direct an acquittal of one of them, nor permit the jury to retire to pass on his guilt alone, in order that if he be found not guilty the other defendants may use him as a witness, where there is any evidence against him which should go to the jury. *Castle v. Bullard*, 23 How. 172.

6. A mere judgment against a trespasser, without satisfaction or that which the law must consider such, is no bar to a suit against a joint trespasser for the same trespass. *Lovejoy v. Murray*, 3 Wal. 1.

7. One who passes over a wharf over which the public has been accustomed to pass cannot be deemed a trespasser, although the wharf is no longer used for the purpose of passage, no notice having been given of the change. *New Orleans, Mobile, & Chattanooga Railroad Co. v. Hanning*, 15 Wal. 649.

8. In Iowa, where an occupant of land under color of title is the owner of valuable improvements which he makes in good faith, the ownership of the land is immaterial in an action for their wilful or negligent destruction. *Milwaukee*

**TRESPASS** — continued.

*& St. Paul Railway Co. v. Kellogg*, 94 U. S. 469.

9. Where timber is cut by a trespasser, the property remains in the owner of the land, and may be pursued wherever it is carried. *Schulenberg v. Harriman*, 21 Wal. 44.

10. If an equitable title be merged in a grant, the person entitled thereunder can have no relief for a trespass in equity. *Preston v. Tremble*, 7 Cranch. 364.

11. Under the law of Texas by which a second action of trespass to try title may be begun within a year where a first action is dismissed, the claim of the plaintiff is not barred in an action against him within the year by the defendant. *Brownsville v. Cavazos*, 100 U. S. 138.

12. The process act of May 19, 1828 (4 Sts. 278), adopted the Alabama statute of 1821, substituting an action of trespass for ejectment, to try the titles to land. *Sears v. Eastburn*, 10 How. 187.

13. In an action of trespass to try title, the plaintiff cannot put in evidence the deed of a married woman not acknowledged in such manner as to pass her title until after the commencement of the suit. *Hollingsworth v. Flint*, 101 U. S. 591.

14. Where, from the inspection of a deed, it is apparent that it does not embrace the land in controversy in the suit to try title, on the trial of which it is offered in evidence, it is properly excluded. It cannot be contended that it was for the jury to say whether it embraced the same land. *Id.*

15. The record of a recovery in ejectment is proof *prima facie* of the title and possession of the plaintiff, in trespass for mesne profits against one who, although not a nominal party in the ejectment, really defended as landlord. *Chirac v. Reinecker*, 2 Pet. 613.

*Actual Possession or Receipt of Rent Prima Facie Evidence of Title, etc.*

See EJECTMENT — IN GENERAL, 20.

*Army Officer — When liable for.*

See ARMY, 31-34.

*Damages — Measure of — Various Cases.*

See DAMAGES, 33 et seq.

*Federal Courts — Jurisdiction in Trespass de Bonis, although Trespass committed Abroad.*

See FEDERAL COURTS — JURISDICTION, 7.

*General Issue in Action for Nuisance — Effect — Title not in Issue — Evidence.*

See JUDGMENT — CONCLUSIVENESS, 143.

*Internal Revenue — Certificate of Probable Cause — Non-return of Goods seized — Action does not lie.*

See INTERNAL REVENUE — REMEDIES FOR ILLEGAL EXACTION, 8.

*Marshal — Action against, does not disturb Possession of Court.*

See COURT — IN GENERAL, 51.

**TRESPASS — continued.**

*Marshal — Action against, for Illegal Levy — Measure of Damages.*  
See MARSHAL, 25.

*Marshal — Action in State Court against, for Seizure under Warrant in Bankruptcy — Not enjoined by Circuit Court.*  
See INJUNCTION, 25.

*Merne Profits — Against Landlord in Fact and Real Defendant in Ejectment.*  
See MESNE PROFITS AND IMPROVEMENTS, 3.

*Officer — Action against — Seizing for Forfeiture — Decree of Restitution conclusive against Forfeiture.*  
See JUDGMENT — CONCLUSIVENESS, 84.

*Railroad Company — Liability for Injury to Trespasser.*  
See RAILROAD — COMPANY, 13.

*Reference of Cause — What is open.*  
See ARBITRATION AND REFERENCE, 7.

*Taking, detaining, and converting — Plea justifying taking and detaining, good.*  
See PLEADING — PLEA TO MERITS, 1.

*United States may maintain Trespass qu. cl.*  
See UNITED STATES — SUITS, 6.

**TRIAL — Court — Trial by — In general.**

See TRIAL — TRIAL BY COURT.

*Evidence — Introduction — In general.*

See TRIAL — INTRODUCTION OF EVIDENCE.

*Jury — Trial by — In general.*

See TRIAL — TRIAL BY JURY.

*Regulation of Trials — In general.*

See TRIAL — REGULATION.

*Review — In general.*

See ERROR; EXCEPTIONS; JUDGMENT — OPENING AND REVERSAL; NEW TRIAL.

*What is, within Meaning of Removal Acts.*  
See REMOVAL, 101, 104.

**TRIAL — INTRODUCTION OF EVIDENCE —**

*Order of Introduction — Correction of Errors.*

See pl. 1-11.

*Objections — When and how made — When waived — Demurrer to Evidence.*

See pl. 12-30.

*Production and Proof of Documents — Notice to produce.*

See pl. 31-42.

1. — *Order of Introduction — Correction of Errors.*] The order in which evidence shall be introduced is matter of discretion of the court, rather than of strict right. *Wood v. United States*, 16 Pet. 342.

2. The time and the order of the introduction of evidence are matter of practice, within the dis-

**TRIAL — INTRODUCTION OF EVIDENCE — continued.**

cretion of the trial court, the decision of which is not revisable on error. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Pet. 443.

3. To refuse evidence offered in rebuttal which should have been introduced as evidence in chief is a matter in the discretion of the court, with which the supreme court will not interfere. *Johnston v. Jones*, 1 Black, 209.

4. An agent may be asked whether he was agent for a party, before the introduction of evidence of the manner of creating his agency. *Conard v. Atlantic Insurance Co.*, 1 Pet. 386.

5. An agreement purporting to have been made by an agent may be proved before the introduction of evidence of his authority. *Metropolis Bank v. Gutschlick*, 14 Pet. 19.

6. Whether there is such proof of agency as to warrant the admission of the acts and declarations of the agent in evidence, is a preliminary question for the court. *United States v. Cliquot's Champagne*, 3 Wal. 114.

7. A deed which refers to a plat for one of the boundary lines may be read in evidence without production of the plat, subject to an identification of the line by competent evidence in course of the trial. *Deery v. Cray*, 10 Wal. 263.

8. A party who offers evidence for a particular purpose can sustain his right to introduce it only by showing it to be admissible for that purpose. He cannot prevail in a court of equity by showing it to be admissible for some other purpose. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Pet. 448.

9. Where to an action against a partnership for debt the defence of one is that the firm name attached to the agreement declared on was signed by the other after dissolution and without authority, the paper may be read in evidence subject to proof to be introduced, and there is no error where subsequent ratification is afterwards proved. *Kelly v. Crawford*, 5 Wal. 785.

10. Evidence may be admissible in rebuttal which would not be admissible otherwise. *Zacharie v. Franklin*, 12 Pet. 151.

11. Where the court erroneously admits inadmissible testimony, it may afterwards, in course of the trial, properly withdraw it from the jury. *Specht v. Howard*, 16 Wal. 564.

12. — *Objections — When and how made — When waived — Demurrer to Evidence.*] Where the objection is general, the court may overrule it and admit the evidence, if any part of it is admissible for any purpose. The objection should be specific. *Monre v. Metropolis Bank*, 13 Pet. 302; *United States v. McMasters*, 4 Wal. 680.

13. It is not error to admit evidence objected to generally, if admissible for any purpose. The objecting party should, in such case, pray for instructions limiting the effect of the evidence to the specific purpose for which the evidence is admissible. *Kelly v. Morris*, 6 Pet. 622.

**TRIAL—INTRODUCTION OF EVIDENCE—continued.**

14. An objection to a copy of a deposition, on the ground that it is not the original, is too indefinite to let in argument that the witness is alive, that another deposition should have been taken in place of the lost one, and that secondary evidence is inadmissible to prove its contents. *Burton v. Driggs*, 20 Wal. 125.

15. An objection to a proper question does not avail as against an answer which goes beyond the question and is improper. A special objection should be taken to the answer. *Gould v. Day*, 94 U. S. 405.

16. It is an irregularity to permit a defendant to interject into the plaintiff's case testimony on the merits of the defence, in support of an objection to evidence for irrelevancy. *United States v. Hunt*, 105 U. S. 183.

17. Objection in ejectment to a letter offered as evidence of license, on the ground that it is a declaration by the plaintiff of his own rights, covers an objection that it does not appear to have been received and acted on at the time of the entry. *Smith v. Shoemaker*, 17 Wal. 630.

18. Where specific objections are made to the admission of evidence, all others are waived. *Evanston v. Gunn*, 99 U. S. 660; *Belk v. Meagher*, 104 U. S. 279.

19. Objections to a deposition because of defects and irregularities which might be obviated by retaking it, must be made before the trial is begun, or they will be deemed waived. *Doane v. Glenn*, 21 Wal. 33.

20. If a release of a witness to remove incompetency by reason of interest be admitted in evidence without objection, any objection on the ground of want of proof of execution will be deemed to have been waived, and cannot afterwards be made on error. *Downey v. Hicks*, 14 How. 240.

21. A variance between the declaration and the instrument declared on can be taken advantage of only on the trial. *Gorman v. Lenox*, 15 Pet. 115.

22. An objection of variance between allegation and proof must be taken when the evidence is offered; if not taken until after the evidence is closed, it will be too late. *Roberts v. Graham*, 6 Wal. 578.

23. On a demurrer to the evidence, everything that the jury might reasonably infer from the evidence is to be considered as admitted. *United States Bank v. Smith*, 11 Wheat. 171.

24. The court, on such demurrer, may render judgment against the demurring party, if, on any view of the facts and under any inference which the law could warrant, the jury might have found against him. *Thornton v. Washington Bank*, 3 Pet. 36.

25. Judgment will be given against the party demurring, if on the evidence it would have been competent for a jury to have found a verdict

**TRIAL—INTRODUCTION OF EVIDENCE—continued.**

against him. *Pawling v. United States*, 4 Cranch, 219; *Chinoweth v. Haskell*, 3 Pet. 92.

26. And this, although on the whole the court may be of opinion that a verdict in his favor would have been more satisfactory. *Pawling v. United States*, 4 Cranch, 219.

27. A demurrer to evidence is not allowable where the demurring party denies the truth of the opposing evidence, and offers evidence in contradiction thereof. *Fowle v. Alexandria*, 11 Wheat. 320. And see *Young v. Black*, 7 Cranch, 565.

28. Issue cannot be joined on a demurrer to evidence where there is any matter of fact in controversy. *Ib.*

29. Judgment cannot be rendered on a demurrer to evidence until there be a joinder in demurrer. *Ib.*

30. It is in the discretion of the court whether or not to compel a party to join in demurrer to evidence. *Young v. Black*, 7 Cranch. 565.

31. — *Production and Proof of Documents* — *Notice to produce.*] A party cannot protect himself from producing his ledger by alleging that it contains entries in the same account prior to the time in question, although such prior entries are not to be inspected. *Harding v. Handy*, 11 Wheat. 103.

32. It is not competent for a party to insist on the effect of part of a document without giving the other party the benefit of pertinent facts appearing in other parts of the same instrument. *Greenleaf v. Birth*, 5 Pet. 132.

33. Instruments under seal, purporting to be executed in the presence of a subscribing witness, must be proved by his testimony, or his absence must be accounted for; and consent that the original paper be taken out of court during the trial, and a copy left, will not dispense with an observance of the rule. *Clarke v. Courtney*, 5 Pet. 319.

34. In Texas, under the statute of May 18, 1846, a certified copy of the record of a lost deed, to be admissible in evidence, must be filed with the papers in the cause three days before the beginning of the trial; but affidavit of the loss of the original, which the statute requires, need not be filed until the trial. *Hanrick v. Barton*, 16 Wal. 166.

35. Where a statute, like the Texas statute, limits the time within which must be filed an affidavit of belief that an instrument is forged which, but for the affidavit, might be offered in evidence without proof of execution, the instrument being filed in court and notice given, an affidavit filed after the time limited is filed too late. *McPhaul v. Lapsley*, 20 Wal. 262.

36. If the execution of the original paper be admitted, and it be in the defendant's possession, a copy in the defendant's handwriting is admissible, without notice to produce the original. *Carroll v. Peake*, 1 Pet. 18.



**TRIAL — INTRODUCTION OF EVIDENCE — continued.**

37. An affidavit of a party, stating his impression that he destroyed a written paper, believing it to be of no further use, and that, if he did not so destroy it, it was lost or mislaid, is sufficient, in the absence of evidence of fraudulent suppression, to authorize the admission of secondary evidence of its contents. *Riggs v. Tayloe*, 9 Wheat. 493.

38. A rule of court providing that proof of the execution of an instrument, or the handwriting of the opposite party, shall be dispensed with, unless an affidavit is filed "denying the same," does not preclude proof of execution on a day other than the day of the apparent date of the instrument. *Ames v. Quimby*, 106 U. S. 342.

39. Nor proof that a paper purporting to be a duplicate is, in fact, dissimilar. *Ib.*

40. It is not necessary to the admission of evidence that a letter containing notice of non-payment was put into the post-office directed to the indorser at his place of residence, that production of the letter should be first demanded. *Lindenberger v. Beall*, 6 Wheat. 104.

41. Judgment of nonsuit should not be rendered under section 15 of the judiciary act of 1789, for a failure to produce books on mere notice, but only where there has been a motion for an order to produce, and an order thereon, which has been disobeyed. *Thompson v. Selden*, 20 How. 194.

42. Where, upon notice, a party produces a written instrument at the trial, and offers to verify it by his oath, the party who calls for it cannot refuse to use it and introduce a copy in the first instance, on a mere assertion that it is not genuine, although when it is introduced he may show wherein it is defective or erroneous. *Stütt v. Huidekoper*, 17 Wal. 384.

*Admissibility, etc., of Evidence — In general.*

See EVIDENCE.

*Competency, Examination, etc., of Witnesses — In general.*

See WITNESS.

*Deposition — General Objection to reading disregarded on Error.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 245.

*Deposition — Objection not made on Motion to suppress, not open.*

See DEPOSITION, 37 et seq.

*Demurrer to Evidence — Result of Defect.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 495.

*Exceptions — How taken.*

See EXCEPTIONS, 19 et seq.

*Immaterial or Irrelevant Evidence — Admission — Exclusion of Evidence, etc. — As Ground for Reversal.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 453 et seq.

**TRIAL — INTRODUCTION OF EVIDENCE — continued.**

*Objections to Admission of Evidence not made — Waived.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 262 et seq.

**TRIAL — REGULATION — In general — Agreements between Counsel — Right to Open and Close.]** Although it is the duty of the court, when, in the course of a trial, a right is asserted on one of two grounds both of which cannot be maintained, to guard against surprise to the opposite party through any change of choice between them, it is a matter of practice and discretion, and not for a writ of error. *Turner v. Yates*, 16 How. 14.

2. Under the act incorporating the Bank of Alexandria, providing that in suits brought by the bank, on notes made negotiable therein, an issue should be made up, and a trial had, at the return term, it was held, the appearance day in Virginia for all process being the day after the term, that in such a suit the court below might rule the defendant to a trial at the return term. *Young v. Alexandria Bank*, 5 Cranch. 45.

3. Where an agreement stipulated that certain records, etc., might be filed at any time before trial, and after the case was called for trial and the plaintiff had stated his case, but before the introduction of evidence, further hearing was postponed, and before the introduction of evidence on the day to which the postponement was had, records were filed, it was held that they were seasonably filed, even though the judge said that he considered the trial as having begun on the day the case was first called. *Mutual Life Insurance Co. v. Harris*, 97 U. S. 331.

4. Parties who have agreed to the appointment of a receiver are concluded by their agreement, and bound by an order making the appointment. *Little Rock Water-works Co. v. Barret*, 103 U. S. 516.

5. The right to open and close is so far dependent on the discretion of the court, that its ruling in reference thereto will not be reviewed by the supreme court. *Day v. Woodworth*, 13 How. 363; *Hall v. Weare*, 92 U. S. 728.

*Exceptions — In general.*

See EXCEPTIONS.

*Exceptions, to avail, must be taken at Trial.*

See EXCEPTIONS, 19 et seq.

*Irregularities in the Trial for which New Trial will be awarded.*

See NEW TRIAL, 7 et seq.

*Mandamus will not issue to control Proceedings on Trial.*

See MANDAMUS, 39 et seq.

*Separate Trials of Persons jointly indicted.*

See CRIMINAL PROCEDURE, 8.

**TRIAL — TRIAL BY COURT — Practice — Record — Review on Error.**] On the trial of a case at law by the court, without a jury, counsel should state the legal propositions on which they rely, and the court should put its rulings thereon on the record, in order that the points of law may be properly presented to the appellate court. *Arthurs v. Hart*, 17 How. 6.

2. If the parties to a common-law action waive a trial by jury and submit the cause to the court for a decision as to both law and fact, the court sits rather as arbitrator than as judge, and its decision cannot be taken up for review by writ of error. *Campbell v. Boyreau*, 21 How. 223.

3. The practice under the act of March 3, 1865 (13 Sts. 501), providing for the waiver of a jury on trials at law, and prior thereto, stated. *Kearney v. Case*, 12 Wal. 275; *Miller v. Brooklyn Life Insurance Co.*, Id. 235.

4. Where a case properly triable by jury is tried by the court under that act, a party who desires a review of the law of the case must have a finding in the nature of a special verdict, or prefer a request to charge, raising the proper points. *Norris v. Jackson*, 9 Wal. 125; *Coddington v. Richardson*, 10 Wal. 516; *Miller v. Brooklyn Life Insurance Co.*, 12 Wal. 285; *Springfield Fire & Marine Insurance Co. v. Sea*, 21 Wal. 158; *Martinton v. Fairbanks*, 112 U. S. 670.

5. The court cannot infer from an agreed statement of facts a substantive fact not agreed, although in such circumstances a jury might be warranted in finding it. *Binney v. Chesapeake & Ohio Canal Co.*, 8 Pet. 214.

*Court — Trial by, without Waiver of Jury. not Ground for Collateral Impeachment of Judgment.*

See JUDGMENT — CONCLUSIVENESS, 54.

*Exception — What is Matter of.*

See EXCEPTIONS, 10, 52.

*Waiver of Jury — Causes removed from State Court.*

See REMOVAL OF CAUSES, 130.

**TRIAL — TRIAL BY JURY — Proceedings, in general — Directing Verdict.**

See pl. 1-18.

*Submission of Issue — What should be submitted.*

See pl. 19-30.

*Instructions — In general — What necessary — What proper.*

See pl. 31-45.

*Instructions — Requests — Waiver of Objections.*

See pl. 46-55.

*Instructions — Abstract Questions — Matters not in Evidence.*

See pl. 56-67.

**TRIAL — TRIAL BY JURY — continued.**

*Instructions — Weight and Sufficiency of Evidence — Province of Jury — Omissions.*

See pl. 68-95.

*Verdict — Construction — Special Verdicts — Sufficiency — Void and Defective Verdicts — Amendment — Bringing in — Polling Jury.*

See pl. 96-115.

1. — *Proceedings, in general — Directing Verdict.*] The court may discharge the jury whenever in its opinion it is manifestly necessary, or whenever otherwise the ends of justice would be defeated. *United States v. Perez*, 9 Wheat. 579.

2. The jury may be instructed to find for the defendant where, should the verdict be against him, the court would set it aside. *Baltimore & Potomac Railroad Co. v. Jones*, 95 U. S. 439; *Griggs v. Houston*, 104 U. S. 553.

3. Or for the plaintiff in the like case. *Anderson County Commissioners v. Beal*, 113 U. S. 227.

4. Where the evidence adduced by the plaintiff, with all the inferences that a jury justifiably could draw from it, is insufficient to support a verdict in his favor, the court may direct a verdict for the defendant. *Pleasant v. Fant*, 22 Wal. 116; *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478.

5. Where it is apparent that a verdict for the plaintiff in an action on municipal bonds void in the hands of one other than a *bona fide* holder for value could not be sustained, the evidence showing him not to be such a holder, it is not error to direct a verdict for the defendant. *Stewart v. Lansing*, 104 U. S. 505.

6. Where the plaintiff has the burden of proof, and the whole evidence taken together does not sustain it, the only direct evidence being to the contrary, a verdict for the defendant is properly directed. *Herbert v. Butler*, 97 U. S. 319.

7. An instruction to find for the defendant cannot properly be given where the functions of the jury would be thus usurped, — where the law on the undisputed evidence would not preclude a recovery. *New York Central & Hudson River Railroad Co. v. Fraloff*, 100 U. S. 24.

8. A direction to find for the defendant may be given only where the evidence is such as to leave no room to doubt as to what the finding should be. *Pence v. Langdon*, 99 U. S. 578.

9. Where evidence is conflicting, a peremptory instruction to the jury to find for the defendant is erroneous. *Moulton v. American Life Insurance Co.*, 101 U. S. 708.

10. Where the conflict of evidence is great, it is not error to refuse to direct a verdict for the defendant. *Klein v. Russell*, 19 Wal. 433.

11. The court may instruct that there is not sufficient evidence to authorize a finding for the plaintiff, but only where there is in fact no evidence to support his claim. *Richardson v. Boston*, 19 How. 263.

**TRIAL — TRIAL BY JURY — continued.**

12. If there be no dispute as to the facts, the court may instruct the jury that the evidence does not warrant a verdict for the plaintiff, if such be the law on the facts. *Toland v. Sprague*, 12 Pet. 300.

13. Where the opening statement of the plaintiff's counsel shows that the contract in suit is void, as in violation of law or against public policy, the court may direct a verdict for the defendant. *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261.

14. So, whenever the nature of the contract may become apparent, although its invalidity is not pleaded. *Id.*

15. Where a clear case is made out for the plaintiff, and there is no defence, or only an invalid one, it is not error to instruct the jury to find for the plaintiff, if they find the facts which the evidence affirms. *Dwyer v. Dunbar*, 5 Wal. 318.

16. In the absence of any evidence to contradict or vary the case made by the plaintiff, it is not error for the court, when the legal effect of his evidence warrants a verdict for him, so to charge the jury. *Hendrick v. Lindsay*, 93 U. S. 143.

17. Where the credibility of the evidence and all material facts are left to the jury, it is not error to give instructions to find for one of the parties on a belief in what would require such a verdict. *Stitt v. Huidekoper*, 17 Wal. 384.

18. Where the evidence on an issue in abatement is all in favor of the plaintiff, the court may direct the jury to find in his favor. *Grand Chute v. Winegar*, 15 Wal. 355.

19. — *Submission of Issue — What should be submitted.* Where there is any evidence, whether weak or strong, which tends to prove the issue, it must be submitted to the jury. *Hickman v. Jones*, 9 Wal. 197. And see *Manchester v. Ericsson*, 105 U. S. 347.

20. The test of whether a case on the evidence should be submitted to a jury, is not whether there is any evidence, but whether there is evidence on which the jury may found a verdict. *Marion County Commissioners v. Clark*, 94 U. S. 273.

21. A case should not be withdrawn from the jury, unless the facts are undisputed, or the testimony is of such a conclusive character that a verdict in conflict therewith would be set aside. *Phanix Insurance Co. v. Doster*, 106 U. S. 30.

22. Where a cause fairly depends on the effect or weight of testimony, it should not be withdrawn from the jury; not unless the testimony be of such a conclusive character that the court would be compelled to set aside a verdict rendered in opposition to it. *Connecticut Mutual Life Insurance Co. v. Lathrop*, 111 U. S. 612.

23. Although, whenever the evidence is not legally sufficient to warrant a recovery, the jury should be so instructed, yet if there be evidence from which they may draw an inference, the case

**TRIAL — TRIAL BY JURY — continued.**

should not be taken from them. *Schuchardt v. Allen*, 1 Wal. 359.

24. A positive direction should not be given by the court, if there be any evidence to be weighed by the jury. *United States v. Laub*, 12 Pet. 1.

25. Where the intent with which an act was done is material, and there is any evidence to prove it, the question should go to the jury. *Lee v. Lee*, 8 Pet. 44.

26. It is error for the court, the testimony taken at a former trial being put in but not read to the jury, to instruct the jury that "the verdict ought to be for the plaintiffs;" the evidence should be submitted to the jury. *Barney v. Schneider*, 9 Wal. 248.

27. Where a suit on a life insurance policy is contested on the ground that the deceased died by his own hand, and there is evidence tending to show insanity, the case is properly submitted to the jury, who are the judges of the weight of the evidence. *Charter Oak Life Insurance Co. v. Rodel*, 95 U. S. 232.

28. A person who, while rightfully in a park open to the public by the proprietor, was attacked by a buck there allowed to run at large, and injured, is entitled, in an action against the proprietor, to have the case sent to a jury, although notices were up in the park cautioning visitors to "beware of the buck," experts testifying that at that season a buck was a dangerous animal, and it appearing that the plaintiff had no knowledge that the deer were dangerous if not disturbed. *Congress & Empire Spring Co. v. Edgar*, 99 U. S. 645.

29. Where the evidence is not legally sufficient to warrant a recovery, the case need not be sent to the jury. *Schuylkill & Dauphin Improvement Co. v. Munson*, 14 Wal. 442.

30. It is error to submit a matter of which there is no competent evidence. *Manning v. John Hancock Mutual Life Insurance Co.*, 100 U. S. 693.

31. — *Instructions — In general — What necessary — What proper.* An instruction calculated to mislead is erroneous. *Caldwell v. United States*, 8 How. 366.

32. Where instructions to the jury are sufficiently intelligible and rightly interpreted, it is enough, although they are not in the best form of words. *Rogers v. The Marshal*, 1 Wal. 644.

33. The court is not bound to repeat to the jury the same substantial proposition of law in different forms; it is enough that it be once laid down in an intelligible and unexceptionable manner. *Kelly v. Morris*, 6 Pet. 622.

34. Where a court has fairly submitted a case on the evidence, and charged as favorably to a party as he could reasonably have asked, it may, in its discretion, decline to charge as to where the burden of proof belongs. *Chicopee Bank v. Philadelphia Seventh National Bank*, 8 Wal. 641.

## TRIAL — TRIAL BY JURY — continued.

35. The court should not give an instruction which makes the case turn on one point only, when there are others necessary to be passed on by the jury. *Adams v. Roberts*, 2 How. 486.

36. Whether there be any evidence is a question for the court. *Richardson v. Boston*, 24 How. 188.

37. In general, where there is any evidence tending to prove a fact in issue, it should be submitted to the jury. *Drakely v. Gregg*, 8 Wal. 242.

38. Where all the evidence in proof of a contested legitimacy is of a marriage at a specified time and place, and all the evidence on that point refers to that occasion, it is erroneous to leave it to the jury to say whether there was a marriage at "any time." *Blackburn v. Crawford*, 3 Wal. 175.

39. Where the evidence clearly proves a change of domicile, it is not error to charge that if the jury believe the evidence they should find that there was one. [DANIEL, J., dissenting.] *Pennsylvania v. Ravenel*, 21 How. 103.

40. Where the question is whether a contract claimed to have been induced by fraudulent representations was promptly repudiated on ascertainment of the fraud, and on account thereof, it is error to refuse a charge calling for the opinion of the jury on this precise point, and to give a charge so broad as to allow the jury to find that the rescission may have been for another fraud. *Upton v. Tribilcock*, 91 U. S. 45.

41. Where, assuming that all the testimony adduced by one or the other party is true, it does not support the issue on which it was offered, the court should so declare, and to refuse is error. *Chandler v. Von Roeder*, 24 How. 224.

42. Thus where, under the Texas statute of limitations, the documentary evidence offered to show color of title was fatally defective, in showing no pretence of derivation from the government, it was the duty of the court to charge that no such color of title had been shown as would support the plea of the statute. *Ib.*

43. The instructions herein held not repugnant to the rule which in a criminal case requires evidence sufficient to satisfy the jury beyond a reasonable doubt. *Miles v. United States*, 103 U. S. 304.

44. Under a statute which requires the instructions to be reduced to writing before they are given, and that they shall form part of the record and be subjects of appeal, it is error to give an instruction not reduced to writing otherwise than by a reference to a certain page of a law magazine. *Hopt v. Utah*, 104 U. S. 631.

45. On trial on indictment, under Rev. Sts. § 5352, for bigamy in Utah, it is not error to call the attention of the jury to the peculiar character of the crime, and its consequences to the women and children, and to remind them of their duty in the premises. *Reynolds v. United States*, 98 U. S. 145.

## TRIAL — TRIAL BY JURY — continued.

46. — Instructions — Requests — Waiver of Objections.] A refusal to give a particular instruction is erroneous only where the request is correct in its very terms and to its full extent, — where the opinion requested, i. e., is so perfectly stated that it is the duty of the court to give it as stated. *Violett v. Patton*, 5 Cranch, 142; *Brooks v. Marbury*, 11 Wheat. 78; *Buck v. Chesapeake Insurance Co.*, 1 Pet. 151; *Elliot v. Peirsol*, 1 Pet. 328; *Columbian Insurance Co. v. Lawrence*, 2 Pet. 25; *Patterson v. Jenks*, 2 Pet. 216; *Scott v. Ratcliffe*, 5 Pet. 81; *Winn v. Patterson*, 9 Pet. 663; *United States v. Metropolitan Bank*, 15 Pet. 377; *Cotts v. Phalen*, 2 How. 376; *Haffin v. Mason*, 15 Wal. 671.

47. Where instructions are asked in the aggregate, and there is anything erroneous in either of them, the court may properly reject the whole. *Indianapolis & St. Louis Railroad Co. v. Horst*, 93 U. S. 291; *United States v. Hough*, 103 U. S. 71.

48. The court is not bound to give instructions in the very terms required. It is enough that so much thereof is given as is applicable to the evidence and the merits of the case. *Clymer v. Dawkins*, 3 How. 674.

49. It is not error to refuse to give instructions asked for, even if correct in point of law, provided those given cover the entire case and submit it properly to the jury. *Tome v. Dubois*, 6 Wal. 548; *Laber v. Cooper*, 7 Wal. 565; *Mills v. Smith*, 8 Wal. 97; *St. Louis Schools v. Risley*, 10 Wal. 91; *Chicago & Northwestern Railway Co. v. Whitton*, 13 Wal. 270; *Indianapolis & St. Louis Railroad Co. v. Horst*, 93 U. S. 291.

50. The judge, in charging the jury, may exercise his discretion as to the form in which he expounds the law and comments on the facts. His duty is discharged if he correctly state the whole law of the case, although not in the language used by counsel in a request for instructions. *Continental Improvement Co. v. Stead*, 95 U. S. 161.

51. If there be a prayer for instructions upon numerous points, it is not error to neglect to notice some of them, if the law be sufficiently and correctly stated. *Law v. Cross*, 1 Black, 533.

52. A prayer that the jury may be instructed that it is "competent for them to infer" from the evidence, etc., is ambiguous, and may properly be refused. *United States v. Jones*, 8 Pet. 399.

53. It is improper to request the court to give the jury an opinion involving matter of fact; and when such a request is made the court is not bound to separate the law from the fact and instruct on the former, although it may be proper to do so. *Smith v. Carrington*, 4 Cranch, 62.

54. A rule of court requiring requests for special instructions to be presented in writing directly after the close of the evidence and before argument, is a reasonable rule the enforcement of which is a matter of discretion with the court

**TRIAL — TRIAL BY JURY — continued.**

making it, and, therefore, not the subject of a writ of error. *Manhattan Life Insurance Co. v. Francisco*, 17 Wal. 672.

55. Where the charge is merely ambiguous, a party who is dissatisfied should ask the court to explain it before the jury leave the bar; and if he do not, he will be deemed to have waived the objection. *Schuylkill & Dauphin Improvement Co. v. Munson*, 14 Wal. 442.

56. — *Instructions — Abstract Questions — Matters not in Evidence.* To refuse to instruct as to an abstract question is not error. *Hamilton v. Russell*, 1 Cranch, 309; *Chirac v. Reinecker*, 2 Pet. 613; *Tucker v. Moreland*, 10 Pet. 53.

57. It is erroneous to give instructions based on a hypothetical state of facts of which there is no evidence. *United States v. Breiling*, 20 How. 252; *Goodman v. Simonds*, Id. 343; *Irvine v. Irvine*, 9 Wal. 617.

58. It is not error to refuse them. *Boardman v. Reed*, 6 Pet. 323.

59. If the court, however, proceed to give instructions on such a state of facts, and instruct erroneously, it is a matter for revision on error. *Etting v. United States Bank*, 11 Wheat. 59; *Beaver v. Taylor*, 1 Wal. 637.

60. To instruct the jury as to facts of which there is no evidence is error. *Michigan Insurance Bank v. Eldred*, 9 Wal. 544; *Tweed's Case*, 16 Wal. 504; *Merchants' Mutual Insurance Co. v. Baring*, 20 Wal. 159; *Chicago, Rock Island, & Pacific Railroad Co. v. Houston*, 95 U. S. 697; *Jones v. Van Benthuyssen*, 103 U. S. 87.

61. To refuse is not error. *Brooks v. Marbury*, 11 Wheat. 78; *Clarke v. Kownslar*, 10 Pet. 657; *Rhett v. Poe*, 2 How. 457; *Dwyer v. Dunbar*, 5 Wal. 318; *Carter v. Carusi*, 112 U. S. 478.

62. It is not error to refuse to instruct on the assumption of a fact of which there is no evidence. *Washington & Georgetown Railway Co. v. Gladmon*, 15 Wal. 401.

63. In an action on a policy of insurance, for instance, it is not error to refuse to charge that an abandonment to the insurer, made through error and so accepted, is void if not warranted by the policy, where there is no evidence of error on either side. *New Orleans Insurance Co. v. Piaggio*, 16 Wal. 378.

64. To submit to the jury a question not raised on the evidence is error. *Ward v. United States*, 14 Wal. 28; *Merchants' Mutual Insurance Co. v. Baring*, 20 Wal. 159.

65. An instruction which assumes the existence of facts of which there is no evidence is misleading and erroneous. *Jones v. Randolph*, 104 U. S. 108.

66. An instruction is erroneous which assumes as a matter of fact that which is not conceded or established by uncontradicted proof. *Knickerbocker Life Insurance Co. v. Foley*, 105 U. S. 350.

**TRIAL — TRIAL BY JURY — continued.**

67. The court, when requested to give instructions based on evidence, must judge of the relevancy, and to some extent of the definiteness and certainty, of that evidence, and should avoid giving any instructions on a question which the evidence does not fairly allow to be raised. *Roach v. Hulings*, 16 Pet. 319.

68. — *Instructions — Weight and Sufficiency of Evidence — Province of Jury — Omissions.* Although the court may give its opinion on a question of fact, it must leave the jury free to decide, according to their own judgments. *Tracy v. Swartwout*, 10 Pet. 80.

69. The court may give the jury its opinion on matters of fact, if careful to distinguish between such opinions, and opinions on matters of law, the former being entitled to such influence only as the jury think proper to allow, while the latter are conclusive. *Games v. Dunn*, 14 Pet. 322.

70. A mere expression of opinion by a judge on a question of fact is not, necessarily, a ground of error, especially where the judge afterwards tells the jury that he merely referred to the proof, and where it is apparent that his remark could not have done harm. *Eastern Transportation Line v. Hope*, 95 U. S. 297.

71. It is not error in instructing the jury, to comment on the evidence, if the right to weigh the evidence and determine disputed facts be not taken from them. *Knickerbocker Life Insurance Co. v. Trefz*, 104 U. S. 197.

72. It is not necessarily error for the court to say to the jury that if they believe the testimony of a particular witness, a certain fact is to be considered as proved, although that witness be contradicted by others, the correctness of such instruction depending on the fulness, clearness, and certainty of his testimony. *Russell v. Ely*, 2 Black, 575.

73. An instruction which has the effect to withdraw from the jury any matter of fact which is open on the evidence, is erroneous. *Jewell v. Jewell*, 1 How. 219.

74. The court should not give an instruction which assumes a controverted fact to be true. *Adams v. Roberts*, 2 How. 486.

75. It is not proper for the court to give positive instructions as to the relative weight and credibility of parol evidence introduced by the several parties. *Van Ness v. Pacard*, 2 Pet. 137.

76. A refusal to charge concerning the relative weight of different parts of the evidence is not error. *Crane v. Morris*, 6 Pet. 598.

77. It is not error to refuse to declare on mere evidence what the result is in law, as it is uncertain what facts may be found. *Patterson v. Jenks*, 2 Pet. 216.

78. It is not error to refuse to give instructions which decide on the sufficiency of the evidence. *Strother v. Lucas*, 12 Pet. 410.

79. An instruction that a certain legal result follows from evidence which only tends to prove

**TRIAL — TRIAL BY JURY — continued.**

the issue is erroneous, as withdrawing from the jury the right to determine matters of fact. *Providence v. Babcock*, 3 Wal. 240.

80. When matter of fact necessary to a defence is controverted, it is erroneous to direct the jury that the evidence is sufficient to bar the action, for such instruction withdraws the question of fact from the jury. *United States v. Tiltonson*, 12 Wheat. 180.

81. A prayer to instruct that there is no evidence of the contract alleged should be overruled, if there be evidence from which the jury might find a contract by implication. *Nutt v. Minor*, 18 How. 286.

82. An instruction that only nominal damages are to be given is erroneous, if there be any evidence for the jury which tends to prove actual damages. *Tracy v. Swartwout*, 10 Pet. 80.

83. While it is correct practice for the judge to instruct in an absolute form on an admitted state of the case, he is not authorized to take from the jury the right of weighing the evidence bearing on controverted facts. *Mutual Life Insurance Co. v. Snyder*, 93 U. S. 393.

84. The court may say to the jury that the evidence leaves no room to dispute a certain fact, if this is clearly so. *Montclair v. Dana*, 107 U. S. 162.

85. Where there is no evidence tending to prove a particular fact, the court is bound so to instruct the jury, if requested; but an instruction that takes from the jury the right to weigh the evidence is erroneous. *Greenleaf v. Birth*, 9 Pet. 292.

86. Where *prima facie* evidence of a fact has been given, its character as such should not be disregarded. The court has no right to direct the jury to view it otherwise than in the aspect in which it was presented. *Crane v. Morris*, 6 Pet. 598.

87. In an action for damages resulting from a collision of vessels, it is error, there being evidence tending to prove that the defendant was in fault, to instruct the jury that, as matter of law, a part of the evidence does or does not warrant a finding that he was, as that question should be left to the jury on all the evidence. *Smith v. Condry*, 1 How. 28.

88. An instruction that a deposition should be favorably considered by the jury, they being told also that it is their province to judge of its effect, and that they are not bound by the view the court has taken of it, is not erroneous. *Garrard v. Reynolds*, 4 How. 123.

89. Where the declaration contains a special count on a contract for labor, and also a *quantum meruit*, it is not error in instructing the jury to limit them to the special contract, where that alone is considered by counsel, and where no evidence of the value of the labor is introduced, and no instructions applicable to the common count are asked for. *Stitt v. Huidekoper*, 17 Wal. 384.

**TRIAL — TRIAL BY JURY — continued.**

90. Where the question is whether A. pledged certain notes made by B., and there is a conflict of evidence as to whether he had a right so to do, an instruction that no such right existed is error for which the judgment should be reversed. *Corn Exchange Bank v. Scheppers*, 111 U. S. 440.

91. On the trial of an action to recover the difference between the amount paid by the defendant to the plaintiff as the part of the price of land owned by both in equal undivided moieties to which the plaintiff was entitled, and one half of the amount received for the land, there was evidence tending to prove that the plaintiff consented that the defendant might sell the plaintiff's share for the sum so paid, and might sell his own share for what he could get. It was held that a charge to the jury which, after submitting this evidence to them, and also evidence tending to show that no fraud was practised, in effect charged that the plaintiff was entitled to recover, unless it appeared that the defendant stated the price for which he could sell his own share, and that the plaintiff assented to this, was erroneous, its effect being to withdraw from the jury the evidence submitted. *Ranney v. Barlow*, 112 U. S. 207.

92. Evidence proving the allegations of a plea should be left to the jury, although the plea is bad. It is error to charge that in law it does not maintain the issue for the defendant. *Otis v. Watkins*, 9 Cranch, 339.

93. An omission to instruct on any point, however material, is not assignable for error, if there were no request to instruct upon it. *Armstrong v. Toler*, 11 Wheat. 258; *Pennock v. Dialogue*, 2 Pet. 1; *Mutual Life Insurance Co. v. Snyder*, 93 U. S. 393.

94. Mere omission to charge fully on one of the points in the case concerning which no charge is requested, is not assignable for error. *United States Express Co. v. Kountze*, 8 Wal. 342; *Carter v. Carusi*, 112 U. S. 478.

95. Where no request was made for specific instructions, the court will not reverse merely because the charge may not have covered the entire case. *Shutte v. Thompson*, 15 Wal. 151.

96. — *Verdict — Construction — Special Verdicts — Sufficiency — Void and Defective Verdicts — Amendment — Bringing in — Polling Jury.* The formal sufficiency of a verdict in the circuit court for Louisiana, as well as its force and effect, are to be determined by the rules of the common law and the acts of congress. *Parks v. Turner*, 12 How. 39.

97. It is to be presumed, the record being silent, that the finding of the jury is in accordance with the instructions of the court. *Gregory v. Morris*, 96 U. S. 619.

98. A special verdict finding not the facts, but the evidence thereof, is imperfect, and no judgment can be rendered thereon. *Prentice v. Zane*, 8 How. 470; *Suydam v. Williamson*, 20 How. 427; *United States v. Jackalow*, 1 Black, 484.

**TRIAL — TRIAL BY JURY — continued.**

99. Where a paper in form a special verdict, except that it did not refer the decision on the facts to the court in the alternative, in the usual way, but found "a general verdict for the plaintiff subject to the opinion of the court" on the facts recited, was agreed to by counsel as a special verdict and passed on below as an agreed case, the court, remarking its formal defect, considered it as a special verdict or as a case agreed. *Mumford v. Wardwell*, 6 Wal. 428.

100. If the jury find ultimate facts, it is enough. It need not find evidence. *Union Consolidated Silver Mining Co. v. Taylor*, 100 U. S. 37.

101. A verdict certain to a common intent is sufficient to sustain a judgment. *Liter v. Green*, 2 Wheat. 306.

102. Thus, a verdict on the *mise* on a writ of right, the several tenants having severed in pleading, that the demandant had more mere right to hold the tenement than the tenants or either of them to hold the tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned, is sufficient. *Ib.*

103. So in an action on a promissory note and an account stated, with pleas of the general issue, the statute of limitations, and payment, and issue thereon, is a verdict for the defendant "upon the issues joined, as to the within note of \$456, and the within account." *Downey v. Hicks*, 14 How. 240.

104. A verdict variant from the issue on a material point is bad, and judgment cannot be rendered thereon. *Patterson v. United States*, 2 Wheat. 221.

105. Thus, in debt on bond, a verdict is bad that finds that the bond is the deed of the defendant and that he is justly indebted thereon, on an issue on performance of the condition. *Ib.*

106. A verdict in a suit to try the title to slaves, which merely finds "for the plaintiff \$1,900, the value of the four negroes in suit," will not warrant a judgment. *Bennett v. Butterworth*, 11 How. 669.

107. Nor will a verdict conditioned to be for either party, as the court may be of opinion for one or the other on the effect of a certain deed, but not identifying the deed. *McArthur v. Porter*, 1 Pet. 626.

108. Where a verdict, although expressed in bad English, clearly manifests the intention of the jury, it will support a judgment; as, for instance, where it speaks of "evaluating" for "valuing." *Snyder v. United States*, 112 U. S. 216.

109. A verdict for the defendant, "subject to the opinion of the court on the points reserved," does not warrant a judgment for defendant, unless the points reserved and the opinion of the court thereon appear of record. *Smith v. Delaware Insurance Co.*, 7 Cranch, 434.

110. A special verdict not received by the court, nor in any way made matter of record, the

**TRIAL — TRIAL BY JURY — continued.**

jury having retired for further consideration with the assent of the counsel of the party in whose favor it was given, and returned another verdict on which judgment was entered, is of no weight as evidence for any purpose. *United States v. Addison*, 6 Wal. 291.

111. The statute of jeofails, judiciary act of 1789, § 32 (1 Sts. 91), embraces verdicts defective in form, but substantially sufficient to enable the court to perceive the right of the cause. *Roach v. Hulings*, 16 Pet. 319.

112. The statute of jeofails embraces verdicts defective in point of form, but substantially sufficient to enable the court to see the finding, and that it covers the issue. *Parks v. Turner*, 12 How. 39.

113. Thus, it will cure a verdict in the words, "We, the jury, find for the plaintiff," in an action on a promissory note, where the only defence is a want of consideration. *Ib.*

114. A verdict in assumpsit, the plea being *non assumpsit*, "that the defendant is guilty in manner and form as alleged in the declaration," although in form defective, is amendable, the error being merely clerical. *Lincoln v. Cambria Iron Co.*, 103 U. S. 412.

115. A stipulation that the jury, if the court be not in session when they agree upon their verdict, may sign, seal, and deliver it to the officer in charge and disperse, is equivalent to an agreement that the court may open the sealed verdict in their absence, and, if necessary, reduce it to proper form, and is a waiver of the right to poll the jury, if they be not in court. *Koon v. Phoenix Mutual Life Insurance Co.*, 104 U. S. 106.

**Charge — Exceptions to.**

See EXCEPTIONS, 2 *et seq.*

**Charge in Circuit Court — State Practice.**

See CIRCUIT COURT — PRACTICE, 8.

**Charge in Trial for Murder.**

See HOMICIDE, 3.

**Charge — Refusal to charge — Error cured by Verdict.**

See PLEADING — AIDED BY VERDICT, 11.

**Charge relative to Matter on which there is no Issue.**

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 283.

**Charge — Reversal for Defect in.**

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 430, 431, 448 *et seq.*

**Charge — Review of.**

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 400 *et seq.*

**Charge — What presumed in Aid of.**

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 316.

**Competency and Province of Jury — Challenges.**

See JURY.

**TRIAL — TRIAL BY JURY — continued.**

*Instructions to Jury in Insurance Cases.*

See **INSURANCE — LIFE**, 57 *et seq.*

*Matters of Equity Cognizance — When tried by Jury in Territorial Court.*

See **TERRITORIAL COURTS**, 8, 9.

*Summoning Jurors — Impanelling — Substituting — Waiver of Jury Trial, etc.*

See **JURY**.

*Verdict — Defect in, as Ground for Reversal and Award of Venire de novo.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 496 *et seq.*

*Verdict — Directing — Where the Party has gone on and introduced Evidence.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 446.

*Verdict — Review on the Evidence.*

See **APPEAL AND ERROR — PROCEEDINGS ABOVE**, 390 *et seq.*

*Verdict for one used as Witness in Trespass against several.*

See **TRESPASS**, 5.

**TROVER.** — A certificate of ownership of shares of stock in a corporation may be the subject of conversion. *McAllister v. Kuhn*, 96 U. S. 87.

2. The legal title is a sufficient title to support an action for a conversion. *Küchen v. Bedford*, 13 Wal. 413.

3. A sale by the owner of personal property in possession of one who has converted it passes title; and the purchaser, after notice, demand, and refusal, may maintain trover for the detention. *Tome v. Dubois*, 6 Wal. 548.

*Evidence admissible under General Issue.*

See **INFANCY**, 17.

*Infant liable for Conversion of Goods received under a Contract.*

See **INFANCY**, 1.

*Purchaser of Bonds sold in Breach of Trust — Liable to Cestui que Trust.*

See **TRUST — CESTUI QUE TRUST**, 8.

**TRUST — Cestui que Trust, in general.**

See **TRUST — CESTUI QUE TRUST**.

*Creation and Construction, in general.*

See **TRUST — CREATION AND CONSTRUCTION**.

*Suits respecting Trust Property, in general.*

See **TRUST — LEGAL PROCEEDINGS**.

*Trustee, in general.*

See **TRUST — TRUSTEE**.

**TRUST — CESTUI QUE TRUST — Rights — In general — Against Trustee and Third Persons.]**

Where a trust is created for the benefit of a third person, although without his knowledge, he may afterwards affirm it and enforce its execution. *Metropolis Bank v. Guttschlick*, 14 Pet. 19.

**TRUST — CESTUI QUE TRUST — continued.**

2. A creditor of a land company obtained a judgment at law against the company without notice, in a state in which the members of the company did not reside, and levied on land there in which the company had only an equitable interest; and the trustee of the company, without notice to the company, gave the creditor the means of obtaining the legal title. It was held that a title so obtained was invalid in equity. *Oliver v. Piatt*, 3 How. 333.

3. Notice to one of three trustees to whom a railroad company had conveyed property, including county bonds issued in aid of its road, that defects in the proceedings preliminary to the issue of such county bonds existed, sufficient to avoid them in the suit of one not a *bona fide* holder for value against the county, does not affect the other trustees nor the *cestuis que trust* whom they represent. *Johnson County Commissioners v. Thayer*, 94 U. S. 631.

4. If a trustee sell the trust property and invest the proceeds, the *cestui que trust* may follow the trust property into the hands of any one who is not a *bona fide* purchaser for value without notice, or hold the substituted property, or proceed against the trustee for the breach of trust, at his option. *Oliver v. Piatt*, 3 How. 333.

5. The trustee cannot deprive him of that option by repurchasing the trust property. *Id.*

6. Even unjustifiable delay, and gross inattention on the part of some of the *cestuis que trust*, are no bar to relief as against persons conversant with the trust. *Id.*

7. Where a trustee wrongfully converts trust property, the *cestui que trust* may take either the original or the substituted property. Or, if either have passed to a *bona fide* purchaser for value, then its value in money; and it makes no difference that the trust property comes back into the hands of the trustee. *May v. Le Claire*, 11 Wal. 217.

8. A purchaser of bonds sold in breach of trust who purchases knowing the purpose of the trust, is liable in trover to the *cestui que trust*. *Küchen v. Bedford*, 13 Wal. 413.

9. Where one lends money to a trustee on a pledge of trust stocks, with notice, either actual or constructive, that the trustee is abusing the trust and applying the money to his own use, and sells the stocks for repayment of the loan, he may be compelled to account to the *cestui que trust*; and he will be deemed to have notice, where the stock certificates show that the stocks are held in trust and where the loan is apparently for private purposes; and it makes no difference that the stocks are other than such as the trustee is authorized to invest in. *Duncan v. Jaudon*, 15 Wal. 165.

10. Trust money deposited in bank by a trustee with his own money is subject to the general rule that, as long as trust property can be traced, the property, or that into which it has been converted, together with such other prop-



**TRUST — CESTUI QUE TRUST — continued.**

erty as the trustee has mixed with it and cannot separate, will remain subject to the trust. *Central National Bank v. Connecticut Mutual Life Insurance Co.*, 104 U. S. 54.

11. A banker's lien on deposits for advances made on their credit cannot prevail, where he has notice, against the equity of a *cestui que trust* in money deposited by the trustee. *Ib.*

12. Where a bank account is opened in the name of one as "general agent," the banker knowing the depositor to be the agent of an insurance company, that the agency is his chief business, and that the account is opened to facilitate that business, and used for the accumulation of premiums and the remittance of funds to the company, he is deemed to have notice of the equity of the company as *cestui que trust*; and that the agent deposits his own money to the same account and checks against it for his private use makes no difference. *Ib.*

13. In such case, where the banker asserts a lien on the balance of the account as security for a loan to the agent for his personal use, the company may assert its right thereto by bill in equity. There is no remedy at law, the contract of the banker, whatever the beneficial interest of the company, being with the agent. *Ib.*

*Foreclosure of Mortgage — Cestuis que Trust — Parties.*

See MORTGAGE — FORECLOSURE, 14, 23.

**TRUST — CREATION AND CONSTRUCTION —**

*How created — How proved — How affected by Statute of Uses.*

See pl. 1-17.

*Constructive Trusts — When they arise — When Purchaser liable for Application of Purchase-money.*

See pl. 18-31.

*Resulting Trusts.*

See pl. 32-42.

1. — *How created — How proved — How affected by Statute of Uses.* Where one acknowledged the receipt of "the sum of" so many dollars "in bonds" of a railroad company, and of so many "dollars of coupons" amounting to "the sum of" so many dollars, "which said sum" he promised "to expend in the purchase of lands" of the company "at or near the average price of" so many dollars per acre, it was held that there was a trust for the purchase of lands with the bonds and at or near the price specified, — an acre of land for every so many dollars of bonds and coupons, and not to purchase with the proceeds of a sale thereof at a nominal price. [STRONG, J., dissenting.] *Küchen v. Bedford*, 13 Wal. 413.

2. A gift by will of real and personal property to the testator's brother, "to be held, used, and enjoyed by him, his heirs," etc., forever, "with the hope and trust, however, that he will not di-

**TRUST — CREATION AND CONSTRUCTION — continued.**

minish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death the land, or so much thereof as he shall not have disposed of by devise or sale, shall descend" to the testator's nieces, daughters of the brother, carries to the brother an absolute estate in fee simple without any limitation over and free from any trust. *Howard v. Carusi*, 109 U. S. 725.

3. A legislative enactment which requires the managers of an insolvent bank belonging to the state to hold its assets appropriated to the payment of certain specified debts, creates a trust in favor of the creditors holding those debts, and, if assented to by them, amounts to a contract with them to carry out the trust. [MILLER, DAVIS, and STRONG, JJ., dissenting.] *Baring v. Dabney*, 19 Wal. 1.

4. A deed to one to sell for such sum as may be directed by the *cestui que trust*, and to apply the proceeds to the use of the latter, and in the mean time to stand seised, the trustee not signing nor accepting the trust otherwise than by silence, creates a mere dry or naked trust. *McGoon v. Scales*, 9 Wal. 23.

5. The execution of a deed of trust does not vest title, where the trustee does not accept the trust. *Armstrong v. Morrill*, 14 Wal. 190.

6. A written declaration by one named as trustee in a deed of trust, made nine years after the execution of the deed, that, immediately on receiving notice of the deed, he refused to accept the trust, is admissible, on proof of handwriting, the declarant being dead, to prove his non-acceptance, although not sealed nor attested by the declarant's oath. *Ib.*

7. If a man voluntarily convey land in trust for his wife, and the trustee refuse to accept the trust or to act in the matter, the trust will not, for this reason, fail. *Adams v. Adams*, 21 Wal. 185.

8. Where a man has signed, sealed, acknowledged, and recorded a voluntary conveyance of land in trust for his wife, he cannot be heard to contend that the conveyance was inoperative for want of delivery, even although the party named as trustee never received it, and, long afterwards, on first hearing of it, refused to act, and the grantor retained the deed in his own possession, but in a place where his wife had access to it, and frequently spoke of it to her and to others as a provision made for her. In such a case the court will recognize and enforce the trust in her favor. *Ib.*

9. To establish the existence of a trust, the burden is on the party who alleges it. *Prevost v. Gratz*, 6 Wheat. 481.

10. In North Carolina, there is no statutory provision requiring express trusts to be "manifested and proved by writing," as in the statute of frauds, and hence such trusts there stand as at common law. *Olcott v. Bynum*, 17 Wal. 44.

**TRUST — CREATION AND CONSTRUCTION —**  
*continued.*

11. While a trust in personalty may be established by parol evidence, such evidence must be clear and convincing, not doubtful, uncertain, and contradictory, nor consisting of loose declarations. *Allen v. Withrow*, 110 U. S. 119.

12. Where a conveyance of real estate is made to one as "trustee," without more, parol evidence is admissible to show for whom or for what purpose he is trustee. *Union Pacific Railroad Co. v. Durant*, 95 U. S. 576.

13. Under the statute of uses there is no privity of estate between a devisee to uses and the *cestuis que use*, and the latter derive their rights from the devisor. *Henderson v. Griffin*, 5 Pet. 151.

14. A devise to trustees and their heirs, for certain uses, and in trust to preserve contingent remainders, gives legal estates to the *cestuis que use*, unless the trustees are required to retain such an estate in order to perform some duty. *Webster v. Cooper*, 14 How. 488.

15. The statute does not affect a use limited upon a use; and where the conveyance is by bargain and sale, its whole force is exhausted in transferring the legal title in fee simple to the bargainee, and the second use remains as a trust. *Croxall v. Shererd*, 5 Wal. 268.

16. A deed the manifest intent of which is that the legal title shall remain in trustees, will be held merely to declare a trust, although it contain words which by themselves would raise a use executed. *Neilson v. Lagow*, 12 How. 98.

17. The words "in trust," in a will, although they may be construed to raise a use, are descriptive, in their ordinary sense, of a technical trust, and will be considered as so used until a different intent on the part of the testator plainly appears. *King v. Mitchell*, 8 Pet. 326.

18. — *Constructive Trusts — When they arise — When Purchaser liable for Application of Purchase-money.* An agent to locate a warrant, who takes to himself a title to land which he should have had surveyed for his principal, becomes a trustee for his principal. *Massie v. Watts*, 6 Cranch, 148.

19. One who agrees to act as agent to pay taxes for another and enters upon performance, cannot change his relation to his principal without notice and buy in the property at a tax sale so as to obtain a valid title for himself; a title so obtained inuring in equity to his principal. *Rothwell v. Dewees*, 2 Black, 613.

20. An agent who discovers a defect in the title of his principal, and makes use of such information to acquire a valid legal title to himself, will be held as a trustee for his principal. *Ringo v. Binns*, 10 Pet. 269.

21. Although *fidei commissa* are abolished in Louisiana, a federal court sitting in equity may there hold a wrong-doer as trustee for the party justly entitled, by way of remedy for the wrong. *Gaines v. Chew*, 2 How. 619.

**TRUST — CREATION AND CONSTRUCTION —**  
*continued.*

22. A court of equity will not be astute to charge a constructive trust on one who has acted honestly, and paid a full and fair consideration, without notice or knowledge. *Wilson v. Wall*, 6 Wal. 83.

23. Thus, whether by the treaty of 1830 with the Choctaws it was intended to create a trust in favor of the children of Choctaw heads of families, or not, where the government, assuming that none was intended, issued a patent thereunder to the head of a family individually, and in fee simple for all the land to be granted to or for the entire family, a purchaser from him for value was held unaffected by a trust, although he knew his vendor to be a Choctaw head of a family, and in a general way that he had the land in virtue of the treaty. *Id.*

24. Where one fraudulently acquires the legal title to property to which another has the better right, equity will compel a transfer. *White v. Cannon*, 6 Wal. 443.

25. One who buys land, knowing that a trustee has released it from the operation of a deed of trust given to secure a debt, without the debt having been paid, or without authority from the creditor, takes the land charged with the trust. *Connecticut General Life Insurance Co. v. Eldredge*, 102 U. S. 545.

26. The general agent of an insurance company, intrusted with the duty of collecting and transmitting premiums, etc., and acting under specific directions, is to be deemed a trustee. *Central National Bank v. Connecticut Mutual Life Insurance Co.*, 104 U. S. 54.

27. Where A. procures himself to be appointed administrator of the estate of a deceased member of a firm, the surviving member of which is of weak mind, ignorant of business, and illiterate, and, by misrepresentations to the probate court, procures the personalty to be sold to B., and then induces the surviving partner to enter land on which the business of the firm (raising stock) has been carried on, and to sell to him for a trifling sum, he then selling the title and B. selling the stock to a third person for a large sum, in pursuance of a previously conceived scheme of fraud to which B. was a party, A. and B. will be charged in equity as trustees of the surviving partner for the profit realized by the transaction. *Griffith v. Godey*, 113 U. S. 89.

28. Where purchase-money is to be reinvested on trusts that require time and discretion, or the acts of sale and reinvestment are contemplated to be at a distance from one another, the purchaser is not bound to look to the application of the purchase-money. *Wormley v. Wormley*, 8 Wheat. 421.

29. But if the purchaser be affected with notice of facts which in law constitute a breach of the trusts, the sale is void as to him, and a mere general denial of knowledge of the fraud will not avail him. *Id.*

**TRUST — CREATION AND CONSTRUCTION —**  
*continued.*

30. A *bona fide* purchaser who pays the purchase-money to one authorized to sell is not bound to look to its application, whether the purchase be of land charged in the hands of a devisee with the payment of debts, or of land devised to a trustee for that purpose. *Potter v. Gardner*, 12 Wheat. 498.

31. But a purchaser from such a devisee may be charged for such part of the purchase-money as may remain in his hands; and if any part of the purchase-money have been misapplied by the devisee with his co-operation, he will remain liable to the creditors therefor. *Ib.*

32. — *Resulting Trusts.*] If land be devised in trust for persons who through subsequent causes can never exist, there is a resulting trust for the heirs-at-law. *King v. Mitchell*, 8 Pet. 336.

33. Generally, a resulting trust in favor of him who pays the consideration is implied from the fact of payment; but such implication may be rebutted by proof that such was not the intention. *Jenkins v. Pye*, 12 Pet. 241.

34. A purchaser who buys in a better title than that of his vendor may be treated as trustee for the vendor, and will be entitled to receive from him only what he paid therefor. *Galloway v. Finley*, 12 Pet. 364.

35. A trustee can have no equity as against an express trust to which he has assented, so as to raise a resulting trust in his own favor, although he paid the purchase-money. *Smith v. McCann*, 24 How. 398.

36. Where tenants in common hold under an imperfect title, a purchase of the outstanding title by one of them will inure to their common benefit, on contribution to repay the purchase-money. *Rothwell v. Dewees*, 2 Black, 613.

37. This rule applies to a purchase made by the husband of a *feme covert* tenant in common. *Ib.*

38. Under a contract by which one party is to devote time and judgment to the selection and purchase, within the year, of western land to an amount not exceeding a certain sum, the purchases to be made and the conveyances to be taken in the name of the other party, who is to furnish the money, the lands to be sold within five years and half the net profits to be paid to the first party for his services and expenses, the legal title so taken is held in trust for the payment of half the profits as agreed. [NELSON, GRIER, and FIELD, JJ., dissenting.] *Seymour v. Freer*, 8 Wal. 303.

39. And where the land is not sold within the five years, the trust will continue after the expiration of that period, unless the first party relinquishes his claim; and the burden of proving such relinquishment rests on the other party. [NELSON, GRIER, and FIELD, JJ., dissenting.] *Ib.*

40. A resulting trust arises on a purchase of land, in favor of one who furnishes part of the

**TRUST — CREATION AND CONSTRUCTION —**  
*continued.*

purchase-money, only where such part is some definite portion of the whole, paid for some aliquot part of the property, and only to the extent of the sum paid. *Olcott v. Bynum*, 17 Wal. 44.

41. And such a trust arises, if at all, at the time of purchase, and not on a subsequent advance of funds. *Ib.*

42. What evidence necessary to establish a resulting trust. *Prevost v. Gratz*, 6 Wheat. 481.

*Charitable Uses — In general.*

See CHARITY.

*Construction of Devises, etc., in Trust — Estate of Trustee, etc.*

See TRUST — TRUSTEE.

*Constructive Trust — Purchase by Executor of Property of the Estate.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 23 *et seq.*

*Contract for Breach, invalid.*

See CONTRACT — WHAT CONSTITUTES, 63.

*Executed Trust — What is, etc.*

See MARRIAGE SETTLEMENT, 11.

*Executor — When accountable for Proceeds of Lands held in Trust by Testator.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 80.

*Fiduciary Relation between Partners — When it exists.*

See PARTNERSHIP, 42, 43.

*Grants in Trust of Public Lands for the Benefit of the Inhabitants of Towns.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 89 *et seq.*

*Purchase of Public Land for another — Fraud, etc.*

See LANDS OF UNITED STATES — CONFLICTING CLAIMS, 38 *et seq.*

*Resulting Trust — Doctrine thereof.*

See DIVORCE, 4.

*Resulting Trust under New York Absconding Debtor Act of 1801.*

See INSOLVENCY, 12.

*Secret Trusts under Statute avoiding Fraudulent Conveyances.*

See FRAUDULENT CONVEYANCE, 11.

*Statute of Frauds as affecting.*

See FRAUDS, STATUTE OF, 14, 15.

**TRUST — LEGAL PROCEEDINGS — Equitable Jurisdiction — Where Trust is stale — When Transfer or Conveyance will be ordered — Parties to Suit — Relief.**

See pl. 1-22.

*When Trustee may be sued at Law.*

See pl. 23-25.

1. — *Equitable Jurisdiction.*] An element of trust will give jurisdiction in equity. *Oelricks v. Spain*, 15 Wal. 211.

**TRUST — LEGAL PROCEEDINGS — continued.**

2. An entry of public land by one in trust for another being forbidden by the pre-emption laws, equity will not enforce such a trust. *Warren v. Van Brunt*, 19 Wal. 646.

3. Where a trustee is dead, the trust being still alive and unexecuted, equity will enforce it through any other appropriate person in whom the control of the property may be; or, if necessary, through its own officers and agents without the intervention of a new trustee. *Batesville Institute v. Kauffman*, 18 Wal. 151.

4. Although, in general, in default of payment, a deed of trust authorizes a sale by the trustee, yet where he attempts to sell property which is subject to conflicting liens, and a part of which is perhaps not covered by the deed, a court of equity has jurisdiction to restrain the sale, determine the rights of all parties, and administer the fund. *Draper v. Davis*, 104 U. S. 347.

5. The question of whether a devisee took the legal estate charged with a trust cannot be determined at law, but only in equity. *Finlay v. King*, 3 Pet. 346.

6. — *Where Trust is stale.*] A stale trust cannot be established in equity, unless it is clearly proved, and the trustee has successfully and fraudulently concealed the facts from the *cestui que trust*. *Badger v. Badger*, 3 Wal. 87.

7. The bill to establish a stale trust should set forth specifically the impediments to an earlier prosecution of the claim, — how the complainant came to remain so long ignorant of his rights, the means used by the defendant to keep him so, how and when he first learned of them, etc. *Ib.*

8. Equity will not relieve for a breach of trust where the *cestui que trust*, being *sui juris*, have acquiesced therein for a long time, for instance, more than twenty years, since all the grounds of action have become complete; and it makes no difference that they are women, and the trustee is a lawyer and the husband of their half-sister, nor that one of them testifies generally that the trustee often promised to settle. *Hume v. Beale*, 17 Wal. 336.

9. — *When Transfer or Conveyance will be ordered.*] He for whose benefit a trust is created, and who is ultimately to receive the fund, may maintain a bill to procure the fund to be paid directly to himself. *Russell v. Clark*, 7 Cranch, 69.

10. Where a trust was created to pay to W. the amount that should be recovered and paid from him to N. on account of a letter of credit, and N. had recovered a judgment at law against W., which was unsatisfied, W. being insolvent, it was held that N. could not reach the trust fund by a bill against W. and the trustee. *Ib.*

11. The owner of the equitable title to land may maintain a bill to compel a conveyance of the legal title; and no suit for title which the defendant may have had with other parties can affect the right to relief; nor is it of any consequence that

**TRUST — LEGAL PROCEEDINGS — continued.**

neither party is in possession, the contest being for the title alone. *Smith v. Orton*, 21 How. 241.

12. — *Parties to Suit.*] Where a testatrix directed her executors to invest a fund, and from the interest pay for the proper education of three nephews, and bequeathed to each of them who should live to finish his education and to attain his majority a certain sum in money, it was held that all three of the beneficiaries were necessary parties to a bill to enforce the trust. *Dandridge v. Custis*, 2 Pet. 370.

13. In general, residuary legatees are not necessary parties to a bill to enforce the trusts of a will, their interests being represented by the executor. *Ib.*

14. Where, by a contract for the purchase and sale of land, the land is to be converted into money and the proceeds divided, the land, in equity, is to be regarded as money, and so the personal representative of the *cestui que trust* may maintain a bill to enforce the trust, without joining the heirs. *Seymour v. Freer*, 8 Wal. 202.

15. To a suit against an infant *feme covert* and her husband to compel a conveyance of her interest in land which another holds in trust for her use, with power to sell and reinvest, the trustee should be made a party, and if he be not, a decree against her will be reversed on her appeal, although she has conveyed as ordered. *O'Hara v. MacConnell*, 93 U. S. 150.

16. Where a suit brought by a trustee to recover trust property, or to reduce it to possession, does not affect his relations with his *cestui que trust*, it is unnecessary to make them parties. *Carey v. Brown*, 92 U. S. 171.

17. Where a trustee is invested with such powers and subjected to such obligations that the beneficiaries are bound by what is done against or by him, they are not necessary parties to a suit by a stranger against him to defeat the trust; in such case, he is in court on their behalf, and in the absence of fraud they are concluded by the decree. *Kerrison v. Stewart*, 93 U. S. 155.

18. A suit to enforce a trust in personalty should be brought, ordinarily, not by the heir of the deceased beneficiary, but by his personal representative. *Ware v. Galveston City Co.*, 111 U. S. 170.

19. If a trustee die, and another be appointed, pending a suit to compel execution of the trust, a supplemental bill in the nature of a bill of revivor should be filed, and the heirs of the original trustee be made parties defendant. *Greenleaf v. Queen*, 1 Pet. 138.

20. — *Relief.*] Where a trustee attempts, by deed, to convey property which he has no right to convey, and as to which, consequently, his deed is a nullity, and the owners of the property seek in equity to have the conveyance set aside as void, and to obtain possession of the premises, the question of the return of the price paid by the vendee is one with which they are

**TRUST — LEGAL PROCEEDINGS — continued.**

not concerned, they having had no benefit therefrom. *Young v. Bradley*, 101 U. S. 782.

21. Where a bill charges a breach of trust, and prays for an account, the payment of the amount found due, the removal of the trustee, and for general relief, a new trustee may be appointed and a transfer of the fund ordered. Such relief is not inconsistent with the specific relief prayed for, and is necessary to carry into full effect an order for the removal of the old trustee. *Mitchell v. Moore*, 95 U. S. 587.

22. In Kentucky, a deed from a trustee under a decree in equity is valid, although not approved by the court, nor recorded pursuant to the statute of that state of February 16, 1818. *Barr v. Gratz*, 4 Wheat. 213.

23. — *When Trustee may be sued at Law.* Where a trust is for the payment of specified debts, and the sums received and paid by the trustee are liquidated, so that on complete execution the sum remaining, if any, is a sum certain, that sum may be recovered in an action at law for money had and received. *McLaughlin v. Swann*, 18 How. 217.

24. Although a trustee, as such, may, in general, be sued only in equity, yet if he bind himself by a personal covenant he will be liable at law, even if he add to his name the words "as trustee," etc. *Duwall v. Craig*, 2 Wheat. 45.

25. Thus where, on the resignation of a trustee to whom the trust estate is indebted, his successor and the co-trustee agree to devote the income of the estate after payment of current expenses to payment of the debt, the agreement may be enforced at law against the promisors in their personal capacity; and this, although they are described in the agreement as trustees. *Taylor v. Davis*, 110 U. S. 330.

*Matter of Trust as Ground for Creditor's Bill.*

See CREDITOR'S BILL, 3, 4.

*State after Nineteen Years.*

See MORTGAGE — POWER OF SALE, 4.

*Suits in Circuit Court — Citizenship as affecting Jurisdiction.*

See CIRCUIT COURT — JURISDICTION, 108.

*Tenants under a Constructive Trustee cannot be ousted by Court of Equity.*

See LANDLORD AND TENANT, 11.

*Trust — When Statute of Limitations begins to run — Express — Constructive.*

See LIMITATION — EXCEPTIONS AND INTERRUPTIONS, 36 et seq.

**TRUST — TRUSTEE — Nature of Estate acquired.**

See pl. 1-6.

*Execution of Trust — In general — Trustee may not claim adversely — Nor acquire Trust Property — What constitutes Breach of Trust.*

See pl. 7-21.

**TRUST — TRUSTEE — continued.**

*Accounting — For what Trustee is allowed — For what he is chargeable — Interest.*

See pl. 22-33.

*Discharge of Trustee — Presumption and Effect.*

See pl. 34-39.

1. — *Nature of Estate acquired.* If land be conveyed to trustees, in trust to sell and convey a fee simple, they take a fee without words of limitation. *Neilson v. Lagow*, 12 How. 98.

2. Where a devise is to one for his use and benefit, but the possession and management of the property are given to trustees, and the *cestui que trust* has but to receive and use the rents and profits, the trustees take the legal estate. *Stanley v. Colt*, 5 Wal. 119.

3. The words used by a deviser to create a trust estate will be limited to the purposes of its creation. Thus, although in general a devise to trustees and their heirs will pass a fee, yet where the trust is merely a dry one, and its purposes are limited to objects ending with lives in being, the estate may be considered as terminating with those lives. *Poor v. Considine*, 6 Wal. 458.

4. The grantee of one who holds land as "trustee" merely, nothing appearing to indicate the nature of the trust, acquires the legal title. The *cestui que trust* only, not a third person, can complain that the conveyance was a breach of trust. And this rule applies to a conveyance from one whose title is derived by patent from the United States. *Cowell v. Colorado Springs Co.*, 100 U. S. 55.

5. Those who claim by inheritance the land of one who had permitted his name to be used as trustee in closing up transactions in which he had and claimed no interest, being a nominal trustee only, have no claim to the land so held. *Zantlinger v. Gunton*, 19 Wal. 32.

6. A private statute for the removal of obstacles to the execution of certain trusts under a will, held to have divested the fee in the original trustees, but not to have vested it in the person empowered to act in their place. *Williamson v. Berry*, 8 How. 495; *Williamson v. Irish Presbyterian Congregation*, Id 565.

7. — *Execution of Trust — In general.* Trustees to sell must join in the sale and conveyance, in order to pass title to trust property held by them jointly. *Wilbur v. Almy*, 12 How. 180.

8. Where A., being embarrassed, conveyed his property to B., who agreed to pay A.'s debts, except one secured by a mortgage on a parcel of the land conveyed, to advance a certain sum to A. annually for four years, and to divide equally between A. and himself any surplus remaining from the property conveyed after repaying himself the amount of advances, and where B. did as agreed, but A. having resumed without leave the management of the property, and the interest on

**TRUST — TRUSTEE — continued.**

the mortgage debt remaining unpaid, and B. refusing to advance money to pay it, a foreclosure and sale were had, and suit having been brought against B., in which it was sought to charge him with waste in permitting the foreclosure, and to compel a reconveyance of the property conveyed, it was held that B. was not a mortgagee, but a trustee, that he had been guilty of no default in the premises, and that, the property conveyed being worth less than the amount of his advances, a sale would not be ordered, although requested by A. *Flagg v. Walker*, 113 U. S. 659.

9. It was held, however, that A. should have six months for redemption by paying to B. the amount of his advances, B. to hold the property discharged from trusts in case redemption should not be had. *Ib.*

10. In the absence of authority, a trustee cannot charge the trust estate; and clearly he cannot, where the instrument creating the trust makes him a trustee merely of the naked legal title, and, by its provisions, effectually excludes the power to charge. *Hewitt v. Phelps*, 105 U. S. 393.

11. Where, on the sale of property, a bond is given secured by a deed of trust, the vendor's attorney being made trustee, with no duties save those of receiving the money and executing a release, he will not be removed from his office because, in a controversy with his client concerning fees, a personal ill-feeling has been engendered, especially where a co-trustee is associated with him. [WAITE, C. J., and HUNT and HARLAN, JJ., dissenting.] *McPherson v. Cox*, 96 U. S. 404.

12. — *Execution of Trust — Trustee may not claim adversely.* A trustee cannot claim the trust property adversely to those for whom he acquired and for whom he holds it. *Union Pacific Railroad Co. v. Durant*, 95 U. S. 576.

13. One who has been ordered by the probate court to pay over to himself as trustee money held by himself as executor, and who files in court his receipt as trustee, and on the strength thereof procures his discharge as executor, cannot be heard to deny that the money came to his hands as trustee. *Cavender v. Cavender*, 114 U. S. 464.

14. — *Execution of Trust — Trustee may not acquire Trust Property.* A trustee cannot lawfully acquire the trust property, either by purchase or by exchange. *Wormley v. Wormley*, 8 Wheat. 421.

15. A sale of land belonging to infant tenants in common, made under order of court for a partition, not set aside for constructive fraud on the ground of a purchase by persons standing in fiduciary relations, where it appeared that those persons did not become interested until after such relations had ceased. *Kearney v. Taylor*, 15 How. 494.

16. Where a sale of trust property is fairly made for an adequate price, and confirmed after opposition, the mere fact that thirteen years after-

**TRUST — TRUSTEE — continued.**

wards the trustee buys the property from the purchaser at the trust sale affords no evidence of fraud, the price paid by the trustee being a fair price, and his purchase not having been contemplated at the time of the original sale. *Stephen v. Beall*, 22 Wal. 329.

17. Purchases by trustee from *cestui que trust*, considered. *Brooks v. Martin*, 2 Wal. 70.

18. — *What constitutes Breach of Trust.*

A trustee with power to sell and reinvest whenever in his opinion the money may be laid out advantageously, must exercise such power fairly and honestly; and the sale will be void if he appear to have been influenced by private and selfish interests, and be for an inadequate price. *Wormley v. Wormley*, 8 Wheat. 421.

19. A trustee of property for a husband and wife, for life, remainder to their children, with power, on consent of the tenants for life, to sell and reinvest, sold the property and reinvested the proceeds, with consent of the tenants, on promise of a mortgage, in real estate purchased in his own name and for his own use, but executed no mortgage. It was held that there was a breach of trust. *Caldwell v. Taggart*, 4 Pet. 190.

20. One who denies that he is a trustee should be removed and a new trustee appointed, if the intervention of a trustee continues necessary. *Irvine v. Dunham*, 111 U. S. 327.

21. A neglect to invest trust funds constitutes a breach of trust for which a trustee may be removed, where the will creating the trust requires an investment. *Cavender v. Cavender*, 114 U. S. 464.

22. — *Accounting — For what Trustee is allowed.* In this country, trustees are, in general, entitled to compensation, to be computed as a percentage on the amount of the estate; but the claim therefor may be forfeited by fraud or negligence. *Barney v. Saunders*, 16 How. 535.

23. The holder of a fund who is by the law a trustee is bound to defend the title, and expenses therein incurred may be charged upon the fund; and if he defend, it makes no difference in the matter of the expenses that he does so in the belief that he is the lawful owner by assignment from the *cestui que trust*. *Williams v. Gibbs*, 20 How. 535.

24. The trustee of a fund may retain thereof enough to reimburse expenses incurred, and to give a fair compensation for personal exertions made in the prosecution of the claim from which the fund was derived. *Ib.*

25. A trust estate must bear the necessary expenses of its administration. *Trustees v. Greenough*, 105 U. S. 527.

26. — *Accounting — For what Trustee is chargeable.* Trustees under a duty to invest on good security, who suffer money to lie on deposit at a banker's, payable on demand with interest, longer than may be reasonably necessary to obtain a proper investment, must bear any loss

**TRUST — TRUSTEE — continued.**

that may arise from a failure of the banker. *Barney v. Saunders*, 16 How. 535.

27. *Aliter*, if the deposit be of money from current income recently made, and otherwise not imprudent. *Ib.*

28. If the trustee receive usurious interest, he must account therefor to his *cestui que trust*. *Ib.*

29. The estate of a husband who had maltreated his wife, and obtained from her the income from her separate property under a promise to invest it for her, but who did not invest it, was charged in equity with interest compounded annually through a long term of years, and allowed nothing for commissions. *Walker v. Walker*, 9 Wal. 743.

30. A trustee residing within the confederacy during the rebellion, who kept no separate accounts of the trust fund, but invested it in his own name, cannot charge it with losses sustained from payments made to him in confederate money. *Mitchell v. Moore*, 95 U. S. 587.

31. — *Accounting — Interest.*] Although compound interest may be charged against a trustee to invest, for gross neglect or for misuse of the funds, simple interest only is, in general, imposed for mere neglect to invest. *Barney v. Saunders*, 16 How. 535.

32. And where the amounts received are not large, nor such as could be easily invested at any time, yearly rests only will be made. *Ib.*

33. A trustee is liable for more money than he receives, with interest, only in case of very supine negligence or wilful default. *Taylor v. Benham*, 5 How. 233.

34. — *Discharge of Trustee — Presumption and Effect.*] A state statute authorizing the chancellor to discharge trustees named in a will (the trust being to hold to the use of a person named for life, etc.), and to appoint others in their place, is valid, where it is enacted at the request of the original trustees, in such case no contract being violated. *Williamson v. Suydam*, 6 Wal. 723.

35. The trustees having been discharged pursuant to the statute, the legislature, by a supplemental act, may grant power to appoint, as trustee, the devisee of the life estate in place of the trustees discharged, and to authorize him to execute the trust. *Ib.*

36. The lapse of forty years and the death of all the original parties, held sufficient to raise a presumption of the discharge and extinguishment of a trust proved once to have existed, by strong circumstantial evidence. *Prevost v. Gratz*, 6 Wheat. 481.

37. Where land has been conveyed upon trusts which fail, so that it has become the duty of the trustee to reconvey, the presumption arises that he has done so; and if, on facts making his duty in the premises clear, the court below finds, not as a fact, but as a conclusion of law, that he has not reconveyed, the appellate court will reverse

**TRUST — TRUSTEE — continued.**

the judgment. *French v. Edwards*, 21 Wal. 147.

38. Although it is to be presumed that a trustee has reconveyed to his grantors where the conditions on which, by their deed to him, the trust was to be executed have become impossible, the presumption is rebuttable. *Lincoln v. French*, 105 U. S. 614.

39. After the trusts declared by a will are performed, the trustee's deed of the trust property, not made in pursuance of any power conferred or duty imposed on him as trustee, conveys no title. *Young v. Bradley*, 101 U. S. 782.

*Bank — Trustee to wind up.*

See BANK, 10.

*Competent as a Witness, when.*

See WITNESS — COMPETENCY, 6.

*Conveyance from Husband to Wife — Trustee no longer necessary.*

See HUSBAND AND WIFE, 23.

*Corporation may purchase at Sale by Trustee under Power in Trust Deed, although Trustee is one of its Officers.*

See MORTGAGE — POWER OF SALE, 7.

*Government Trustee for Owner of Abandoned and Captured Property.*

See ABANDONED AND CAPTURED PROPERTY, 2.

*Liability of Trustee compelled to pay over to Confederate Authorities — Federal Question.*

See ERROR TO STATE COURT — JURISDICTION, 151.

*May by Will empower Executors to sell Trust Lands.*

See POWER, 8.

*Party to Suit to enforce Trust Deed, etc. — To enjoin Sale, etc.*

See REMOVAL OF CAUSES, 65, 66.

*Power to submit Matter of Partition to Arbitrators.*

See PARTITION, 3.

*Property conveyed in Trust for Use of a Church — Trustees not removable without Cause shown — Disqualification.*

See RELIGIOUS SOCIETIES, 20, 21.

*Railroad Mortgage — Rights, Powers, etc., of Trustees.*

See RAILROAD — MORTGAGE, 47, 60 et seq.

*Right to create Lien on Bank Stock held in Trust.*

See BANK, 14.

*Trustee may insure for Benefit of Cestui que Trust.*

See INSURANCE — FIRE, 2, 3.

*Vendor, Trustee for Title to Purchaser in Possession, etc.*

See LIMITATION — EXCEPTIONS AND INTERRUPTIONS, 43.

**TUGS AND TOWAGE — Duties and Liabilities of Tugs and Tug-owners.]** A steam-tug is bound to the exercise of such caution and skill as prudent navigators usually employ in similar services, and is responsible for injury to her tow caused by the want thereof. *The Webb*, 14 Wal. 406.

2. Although, in general, damage to the tow does not raise a presumption of want of care and skill on the part of the tug, it may be otherwise in certain cases; as, for instance, where the tug goes three miles out of her proper track in running a well-known straight course of nine miles, although after she starts thereon a thick fog comes on, and although there are various known cross-currents. *Id.*

3. A steam-tug which engages to tow a vessel into port, although not a common carrier nor an insurer, is bound to exercise reasonable care and skill, and is responsible for the want thereof; the port being her home port, she is bound to know the channel, how to reach it, and whether, in the state of the wind and water, it is safe and proper to attempt to enter with a tow. *The Margaret*, 94 U. S. 494.

4. Although a transportation company, engaged in towing a barge from one point to another, does not occupy the position of a common carrier, nor have that exclusive control of the barge which

**TUGS AND TOWAGE — continued.**

that relation would imply, it does have control to the extent necessary to enable it to fulfil its contract, and is, therefore, bound to exercise such care and diligence as a skilful performance of the stipulated service requires. *Eastern Transportation Line v. Hope*, 95 U. S. 297.

5. The owners of a steamer undertaking to tow vessels are responsible for an accident resulting from a want of proper knowledge on the part of the master of the difficulties of navigation in the river in which the steamer plies, such, for instance, as the distance from one to another of two piers between which he attempts to pass, ignorance of the currents, of whether, in a certain state of the river, that which at low water would be an obstruction can be passed over, etc. *The Lady Pike*, 21 Wal. 1.

6. A river steamboat approaching a bridge with piers, when the wind is high and she cannot pass without danger, should lie by until the wind subsides. If, instead, she tries to pass, and a barge in her tow strikes a pier and sinks, the owners of the steamboat cannot contend that the loss was due to "the dangers of navigation." *The Mohler*, 21 Wal. 230.

*Collision in general.*

See COLLISION.

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**ULTRA VIRES — Application of the Doctrine — In general.**

See CORPORATION — POWERS AND LIABILITIES.

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See ARBITRATION AND REFERENCE, 11-13.

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**UNION PACIFIC RAILROAD — Legislation directing Suits against.**

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*Provisions as to Bonds, Interest, Earnings, etc.*

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**UNITED STATES — Bankruptcy and Discharge of Public Debtor as affecting.**

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*Claims against United States — In general.*

See UNITED STATES — CLAIMS.

**UNITED STATES — continued.**

*Courts of United States — In general.*

See FEDERAL COURTS.

*In general — Powers, etc., under the Constitution.*

See UNITED STATES — IN GENERAL.

*Lands of United States — In general.*

See LANDS OF UNITED STATES.

*Liability to Suit, etc. — In general.*

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*Limitations as affecting — In general.*

See UNITED STATES — LIMITATION.

*Officers of United States — In general.*

See OFFICER.

*Payment — Priority in general.*

See UNITED STATES — PRIORITY OF PAYMENT.

*Suits by and against — In general.*

See UNITED STATES — SUITS.

**UNITED STATES — BANKRUPTCY — Discharge of Public Debtor does not bar United States.]** A debt due the United States is not discharged by the discharge in bankruptcy of the debtor. The bankrupt act of 1867 does not expressly so



**UNITED STATES — BANKRUPTCY — continued.**  
provide, and such intent is not to be presumed. The rights and remedies of the sovereign are not to be devested by any general words. *United States v. Herron*, 20 Wal. 251.

**UNITED STATES — CLAIMS — Assignment confers no Rights, but Assignor may not set up Invalidity — Payment of Part of Claim assigned creates no Estoppel — Parties to Assignment concluded by Legislative Recognition — Payment to Assignee's Attorney, when good.]** One cannot acquire as against the United States the rights of another in a contract with the United States, as, for instance, the right to compensation for carrying the mails, by a mortgage from the contractor and a foreclosure by judicial sale. Such a transfer is directly within the prohibition of §§ 3477, 3737, Rev. Sts., relating to assignments of claims against the United States. *St. Paul & Duluth Railroad Co. v. United States*, 112 U. S. 733.

2. If a government contract for supplies, containing a clause forbidding subletting or assigning, be abandoned by the contractor and taken up by his sureties, with the consent of the government agent, and by them turned over to one who agrees to furnish the supplies and pay them a percentage of the money received, that person does not thereby become interested in the original contract, so that if the government, desiring to abandon it, propose to settle equitably with all persons so interested, he will be entitled to share in the settlement. *Kellogg v. United States*, 7 Wal. 361.

3. If the law prohibiting the assignment of claims against the United States applies to the case of an assignment of the claim of a county for indemnity for swamp lands sold by the United States, a county which has sold and assigned such a claim cannot, after the United States has paid it, invoke the law to avoid its contract of sale or to recover the amount received by its assignee. *American Emigrant Co. v. Adams County*, 100 U. S. 61.

4. The act of February 26, 1853 (10 Sts. 170), to prevent frauds on the treasury, applies only to cases of voluntary assignment of demands against the government, not to the passing of claims to heirs, or devisees, or assignees in bankruptcy. *Erwin v. United States*, 97 U. S. 392.

5. An assignment for the benefit of creditors is not within the prohibition of the act, nor does it violate any principle of law or public policy. *Goodman v. Niblack*, 102 U. S. 556.

6. The United States, by paying part of a claim to an assignee thereof, is not precluded, when sued for the balance, from denying the validity of the assignment. *McKnight v. United States*, 98 U. S. 179.

7. Where the assignment of a contract with the United States has been recognized by acts of congress, the parties thereto cannot dispute its validity. *Goodman v. Niblack*, 102 U. S. 556.

**UNITED STATES — CLAIMS — continued.**

8. Notwithstanding the act of July 29, 1846 (9 Sts. 41), which forbids the payment of claims against the government to any one other than the claimant, or his executor or administrator, or an attorney in fact under a power executed after allowance of the claim, and the act of 1853, payment to such an attorney may be good against the claimant, the power being unrevoked at the time of payment, although executed before the claim was allowed. *Bailey v. United States*, 109 U. S. 432.

*Contracts for Army Supplies.*

See WAR DEPARTMENT.

*Contracts with Government — Construction.*

See CONTRACT — CONSTRUCTION, 13, 52 et seq.

*Limitation of Claims against United States.*

See COURT OF CLAIMS — PRACTICE, 17 et seq.

*Prosecution of Claims.*

See COURT OF CLAIMS.

*Statutory Reference of Claim against — Effect.*

See ARBITRATION AND REFERENCE, 4.

**UNITED STATES — IN GENERAL — Supremacy of Federal Power — Power to provide for Restoration of State Governments — Power to acquire Territory and over Territory acquired — War Power — Power to contract.]** The federal government, although limited in its powers, is supreme within its sphere of action; and its laws, when pursuant to the constitution, are the supreme law of the land. *McCulloch v. Maryland*, 4 Wheat. 316.

2. The federal sovereignty within a state is distinct from that of the state itself, and each is independent within its sphere of action, although both exist and are exercised within the same territorial limits. *Ableman v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wal. 397.

3. And neither can intrude within the jurisdiction of the other, or interfere with its action; but where a conflict arises between their respective enactments, or in the enforcement of their respective authorities, those of the federal government must have supremacy until the validity of such enactments or authorities is determined by the federal tribunals. *Tarble's Case*, 13 Wal. 397.

4. The authority of the general government to provide for the restoration of state governments, when subverted and overthrown, is derived from its obligation to guarantee to every state a republican form of government. *Texas v. White*, 7 Wal. 700.

5. The power is primarily a legislative power, and resides in congress, although the president may institute temporary government in an insurgent district, or take provisional measures for the restoration of a loyal government therein. *Ib.*

6. In its exercise a discretion in the choice of means is necessarily allowable, it being therein

**UNITED STATES — IN GENERAL — continued.**  
essential only that the means chosen be necessary and proper for its execution, and not in contravention of the constitution. *Ib.*

7. The United States has power to acquire territory either by conquest or by treaty. *American Insurance Co. v. Canter*, 1 Pet. 511.

8. When the United States acquires new territory by treaty it does not succeed to the prerogative rights of the former sovereign, but takes subject to its own institutions and laws. *Pollard v. Hagan*, 3 How. 212.

9. The constitution does not expressly confer the power to acquire territory to be governed as a colony, but it confers power to admit states, and under that power territory may be acquired which is intended to be admitted as a state, and which, from the necessity of the case, may be governed by congress until fitted to be so admitted. [*McLEAN and CURTIS, JJ., dissenting.*] *Scott v. Sandford [Dred Scott Case]*, 19 How. 393.

10. The constitutional powers of the federal government do not enable the government to have or exercise that police control over public places within the state of Louisiana which belonged to the crown either of France or of Spain; and the treaty of cession could not enlarge that power. *New Orleans v. United States*, 10 Pet. 662.

11. The United States may take the legal title to land as security for a debt, notwithstanding the act of May 1, 1890, § 7 (3 Sta. 568), declaring that no land shall be purchased on account of the United States except under a law authorizing such purchase, and although not specially authorized by any particular statute. *Neilson v. Lagow*, 12 How. 98.

12. The war power of the government, considered. *Miller v. United States*, 11 Wal. 268; *Tyler v. Defrees*, Id. 331.

13. The United States may enter into a contract not prohibited by law, and appropriate to the proper exercise of its powers. *United States v. Tingey*, 5 Pet. 115; *United States v. Bradley*, 10 Pet. 343; *United States v. Linn*, 15 Pet. 290.

14. The maxim that the king can do no wrong has no application to the United States or to any of its officers. *Langford v. United States*, 101 U. S. 341.

*Agencies not Subject to State Taxation.*

See TAX — POWER, 62 *et seq.*

*Allowance by Commissioner of Internal Revenue of Claim for Excess paid by Brewer, etc., when conclusive on the Government.*

See INTERNAL REVENUE — REMEDIES FOR ILLEGAL EXACTIONS, 21.

*Bound as a Creditor by Exemption of Homestead.*

See HOMESTEAD, 4.

*Captures — When condemned to Government.*

See CAPTURE — CAPTOR'S RIGHTS, ETC., 4-6.

**UNITED STATES — IN GENERAL — continued.**

*Compensation to Officer — Compensation for Expenditures which he is required to make — Extra Compensation, etc.*

See OFFICER, 26 *et seq.*

*Confiscation of Property of Persons in Rebellion — Power.*

See CONFISCATION.

*Constitution — First Ten Articles of Amendment limit Powers of United States.*

See CONSTITUTION, 5 *et seq.*; EMINENT DOMAIN, 4.

*Consular Courts — Right to maintain under Treaty of 1862 with Ottoman Empire.*

See CONSULAR COURTS.

*Contract with Government — When implied.*

See CONTRACT — WHAT CONSTITUTES, 14.

*Contracts with — In general.*

See CONTRACT.

*Corporation — United States not, nor a Person, within the Meaning of a Statute declaring who may take by Devise.*

See DEVISE AND LEGACY, 76.

*Covenants on Behalf of, by Head of Department — When such Person is not bound.*

See AGENCY, 28.

*Duties on Imports — Lien for.*

See DUTIES — ASSESSMENT, 48 *et seq.*

*Eminent Domain — Right of, may be exercised within the States.*

See EMINENT DOMAIN, 1.

*Estopped to deny the Rights of Informer in Confiscation Proceedings — When.*

See CONFISCATION, 57.

*Foreign Power cannot erect Court of Justice within its Territory except by Treaty.*

See INTERNATIONAL LAW, 9.

*Government Contracts — Modification.*

See CONTRACT — MODIFICATION AND MERGER, 4-6.

*Grant of Public Land can be impeached for Fraud by Government alone.*

See GRANT, 10.

*Grants — Government alone can take Advantage of Breach of Condition in Grant to Indians — Wairer.*

See INDIANS, 12, 13.

*Indians — Relations between Government and Indian Tribes.*

See INDIANS.

*Interest — Not chargeable except on Express Contract therefor.*

See COURT OF CLAIMS — JURISDICTION, 11.

*Mines — Government no Lien on Ore dug from Public Lands.*

See TAX — POWER, 51.

*Money paid by Fraud or Mistake — Recovery.*

See ASSUMPSIT, 27.

**UNITED STATES — IN GENERAL — continued.**

*Money received at Confiscation Sale — When not liable therefor.*

See ASSUMPSIT, 28.

*Navigable Waters — Shores and Soil under them not granted to the United States by Constitution.*

See WATERS, 5.

*Officer — Suits against, for Use of Invention.*

See COURT OF CLAIMS—JURISDICTION, 36.

*Officer liable to Arrest for Felony.*

See OFFICER, 12.

*Officers and Agents — Exemption from Liability for Acts done during Rebellion.*

See REBELLION, 13 et seq.

*Officers — Attorneys of Federal Courts not United States Officers.*

See ATTORNEY, 5.

*Officers — In general.*

See OFFICER.

*Patented Invention — Right to use without Compensation.*

See PATENT — LICENSE.

*Payment of Debts due Decedents — District of Columbia or Domicile.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 17.

*Power concurrent with State Power — Independent.*

See STATES — RIGHTS AND POWERS, 11.

*Principal bound to refund Money paid to Agent — When.*

See AGENCY, 67.

*Priority of Payment — Subrogation of Surety in Bail-bond in Criminal Cases.*

See SUBROGATION, 4, 5.

*Prize — Right of Non-commissioned Captor — When the Government may contest.*

See PRIZE — PRACTICE, 27.

*Public Lands — Appeal in Proceedings for — How taken.*

See APPEAL — TAKING AND PERFECTING, 12.

*Public Lands — Disposal — Lands in New Orleans, etc.*

See LANDS OF UNITED STATES — TITLE.

*Public Lands — Land of Confederacy became Property of Government on Fall of Confederacy.*

See CONFISCATION, 15.

*Purchaser of Lands sold for Direct Taxes under Acts of 1861 et seq. — Rights as such.*

See DIRECT TAX.

*Railroads to which Public Land has been granted on Condition, etc. — Right to Use of.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 39.

*Rebellion — Powers of Government in Case of.*

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**UNITED STATES — IN GENERAL — continued.**

*Receivers and Disbursers of Public Money — In general.*

See RECEIVER OF PUBLIC MONEY.

*Right to call Citizen to Seat of Government.*

See TAX — POWER, 37.

*Riparian Proprietor in City of Washington — Rights.*

See WASHINGTON, 2.

*Seizure for Forfeiture — Adoption when Goods seized are already subject to Forfeiture.*

See DUTIES — PENALTIES AND FORFEITURES, 56.

*Supremacy — Government may use Force in State to compel Obedience to Federal Laws.*

See CIVIL RIGHTS, 31.

*Territories — Power of the Government over.*

See TERRITORIES, 1 et seq.

*War Power — Legal-tender Acts not an Exercise thereof — Power of Sovereignty — Power to borrow Money — To provide a National Company.*

See TENDER, 10 et seq.

**UNITED STATES — LIABILITY — Liability on**

*Contracts, in general — For Property used and destroyed in Military Service — For Money paid to bribe Officer — For Lost Proceeds of Confiscation Proceedings — Liability on Award — As Holder or Acceptor of Bill of Exchange, etc.*

See pl. 1-28.

*Liability on Contracts entered into by Public Officers — For Laches or Wrongful Acts of Public Officers.*

See pl. 29-39.

*Liability for Interest — In general, not liable.*

See pl. 40-42.

1. — *Liability on Contracts, in general — For Property used and destroyed in Military Service — For Money paid to bribe Officer — For Lost Proceeds of Confiscation Proceedings — Liability on Award — As Holder or Acceptor of Bill of Exchange, etc.]* The court of claims, in the construction and enforcement of contracts with the government, is bound to apply the principles which govern like contracts between individuals. *United States v. Smoot*, 15 Wal. 36.

2. Thus, a contractor, neither preparing nor offering to perform, cannot maintain a suit for profits he might have made by performance under prior regulations, the adoption of such regulations not amounting to notice of a refusal to receive performance according to the terms of the contract, nor disabling the government from performing, and one or the other of those effects being necessary, as in any case of contract for the delivery of personal property, to absolve the contractor. *Id.*

## UNITED STATES — LIABILITY — continued.

3. Where the government unjustifiably suspends the work of a contractor who has agreed to supply the skilled labor and the materials necessary for the erection of buildings for government use, it is liable in the court of claims for such damage as he has sustained, the government in such case being bound by the same rule that applies in the case of individuals. *United States v. Smith*, 94 U. S. 914.

4. Where the owner of a steamboat is ordered by a federal military officer, on pain of imprisonment, to fit her to carry a cargo to a particular place for a *per diem* compensation, and the owner, although protesting, fits her, and proceeds on the voyage with his own officers and crew, the government is a mere freighter; and if the boat deliver her cargo, but the return voyage be broken up by her running aground, the government will be liable for such compensation reckoned to the time when the boat, but for the disaster, would have completed her return trip, and for nothing more. *Reed v. United States*, 11 Wal. 591.

5. Thus, the government is not liable for the expenses of a pilot and a crew sent to get the boat off, although sent on consultation with the government officer, and with a view to the protection of the interest of the government as well as that of the owner. *Ib.*

6. Where a steamer, lying at a wharf in a port on one of the great rivers, was taken into the government service by a quartermaster, for a trip to different points on the river, the compensation being stated to the captain at the time, and no objection being made to the service or the compensation, and the possession, command, and management of the steamer being retained by the owner during the service, the government was held to be charterer on a contract of affreightment, and not liable thereunder for the value of the steamer, which was destroyed by fire on her return trip, without fault of the owner. [MILLER, J., dissenting.] *Shaw v. United States*, 93 U. S. 235.

7. Where, without express contract and in the absence of military exigency, subsistence stores were taken into custody by army officers on the frontier and afterwards used in part, in part carelessly destroyed, and in part spoiled by natural causes, the owner having left, but without intent to abandon, that part of the country, where, had he remained, the disturbed state of affairs would have prevented him from taking care of the property, the government was charged with what was so used and destroyed, at its value at the time it was received, and not at its value when it was so used, etc. *United States v. Gill*, 90 Wal. 517.

8. One who has contracted with the government to transport from port to port remote from any seat of war, stores and supplies not those of an advancing or retreating army, is not, while engaged therein, "in the military service," within the meaning of the act of March 3, 1849, § 2 (9 Sta. 414), providing for payment for horses and

## UNITED STATES — LIABILITY — continued.

other property lost in such service. *Stuart v. United States*, 18 Wal. 84.

9. Property alleged to have been captured "by a band of hostile Indians," no further details being given, cannot be said to have been captured "by an enemy," within the meaning of that term as used in the act of 1849. *Ib.*

10. A suit cannot be maintained against the United States in the court of claims, on a contract with the president for secret services rendered during the war, the public disclosure of such a contract being against public policy. *Totten v. United States*, 92 U. S. 106.

11. A claim cannot be maintained against the United States for money paid by the claimant to an army officer as a bribe, and taken from him by the United States. *Clark v. United States*, 102 U. S. 322.

12. Where, pending proceedings for the condemnation of property seized under the confiscation act, the property was sold by order of court and the proceeds paid over to the clerk, who deposited the same to his credit in a national bank, duly recognized as a depository of public money, and the bank failed and the money was lost, and in the confiscation proceedings judgment was rendered for the owner of the property, it was held that the owner had no claim against the United States by reason of the loss of the money, the money not having been paid into the treasury. *Branch v. United States*, 100 U. S. 673.

13. A distiller compelled by the United States to buy meters, one of which was never used, and the other of which failed to work properly, cannot recover their cost from the United States, the pecuniary result to him being no worse than though they had worked well. *Finch v. United States*, 102 U. S. 269.

14. Where the cashier of a United States sub-treasury embezzles money and lends it, and the borrower, for the purpose of concealing the embezzlement during an examination of the funds in the sub-treasury about to be made, by fraudulent representations to the cashier of a bank, procures gold certificates to be deposited in the sub-treasury, the bank acting in good faith and in the usual course of business, and the cashier being privy to the fraud whereby the borrower procures the certificates, the bank may recover from the government the gold represented by the certificates. The government cannot hold money against the claim of an innocent party, where it has gone into the treasury through the fraud of its agent. The rules of law applicable to an individual in such a case apply to the government. *United States v. State Bank*, 96 U. S. 30.

15. Otherwise, as to a draft procured by the borrower from the bank by similar fraudulent representations, but received by the cashier of the sub-treasury under circumstances not imputing to him knowledge of the fact that the draft was not the property of the borrower. In

**UNITED STATES — LIABILITY — continued.**

such case the United States is not liable to the bank for the amount. *State Bank v. United States*, 114 U. S. 401.

16. A joint resolution of congress authorizing the head of a department to "investigate and adjust" a claim against the government, on a prescribed basis, there being no mutuality of assent, and no consideration, does not bind the government as by an award, and the authority may be revoked by a repeal of the resolution. *Chorpenning v. United States*, 94 U. S. 397.

17. Where a vessel, the property of a Spanish subject, was captured by the army, or by the army and navy operating together, chartered, and used for a time by the government, and finally brought in and libelled as prize, and, restitution being ordered, proceedings were stayed to await an amicable settlement of demurrage by the two governments, and after some delay the state department requested that the question be referred to the court, which still had jurisdiction, it was held that the government was bound by the submission, although no express legislative authority had been conferred on the executive to make it, and that a decree might be entered for the demurrage. *The Nuestra Señora de Regla*, 103 U. S. 92.

18. If the government, through its authorized agent, become the holder of a bill of exchange, it is bound to use the same diligence, to charge the indorser, that a private holder would be bound to use. *United States v. Barker*, 12 Wheat. 559.

19. If the United States, through an authorized officer, accept a bill of exchange, it is bound for its payment to a *bona fide* holder for value, whatever the equities between it and the drawee. *United States v. Metropolis Bank*, 15 Pet. 377.

20. The federal government has a right to make use of bills of exchange in conducting its fiscal operations; and where it becomes a party to such a bill, its rights and liabilities thereunder are to be determined by the same rules which are applied where the party is a person. *The Floyd Acceptances*, 7 Wal. 666.

21. Where it becomes a party, *e. g.*, by acceptance, by the action of some public officer or authorized agent, as if it become a party it must, the authority of such officer or agent may be inquired into in the same way that the authority of an agent of a person may be. *Ib.*

22. Authority in such cases depends on the same principles that determine authority in other contracts, the holder not being aided by the doctrine which in some circumstances extends to the innocent holders of negotiable paper more liberal protection than is given to the holders of other obligations. *Ib.*

23. There being by law no express authority for a public officer to draw or accept bills of exchange, authority can exist only where such bills are the appropriate means for the exercise of other and admitted powers. *Ib.*

**UNITED STATES — LIABILITY — continued.**

24. And, there being under existing laws no occasion for a public officer to accept bills on behalf of the government, such an officer cannot bind the government by making such an acceptance. *Ib.*

25. Acceptance of a bill of exchange by a public officer in payment for government supplies in advance of their delivery, is, like payment in advance in any other form, in contravention of the act of January 31, 1823, § 1 (3 Sts. 723). *Ib.*

26. Thus, acceptances on long time, of bills drawn on the secretary of war, by army contractors, for supplies not yet furnished, and to be charged to account of the contract, were held to be without authority and void. [NELSON, GRIER, and CLIFFORD, JJ., dissenting, on the ground that the bills were drawn on a particular fund which might or might not be sufficient to pay them, and so not negotiable.] *Ib.*

27. Under the act of March 2, 1861 (12 Sts. 220), providing that purchases of government supplies shall be upon advertisement for proposals, except where public exigencies require immediate delivery, the determination of the existence of such exigency is in the discretion of the officer in charge of the matter; and the validity of the contract does not depend on the degree of wisdom with which such discretion is exercised. *United States v. Speed*, 8 Wal. 77.

28. That part of rule No. 1179 of the army regulations of 1863 which requires contracts for subsistence stores to provide for their termination at such time as the commissary-general may direct, has no application to a contract for slaughtering and packing a definite number of hogs. *Ib.*

29. — *Liability on Contracts entered into by Public Officers — For Laches or Wrongful Acts of Public Officers.* A contract by a medical purveyor for supplies of ice for hospital use will not bind the government without the approval of the secretary of war, the purveyor having no power to bind the government in such case. *Parish v. United States*, 8 Wal. 489.

30. Nor will a lease by a local assistant quartermaster of property for the use of the quartermaster's department, until it is approved by the quartermaster-general, although approved by the local military commander. *Filor v. United States*, 9 Wal. 45.

31. The assistant surgeon-general at St. Louis, during the war, had authority to bind the government by a contract for the purchase of ice for the sick of the western armies. His order, until revoked or disapproved by the surgeon-general, was valid and binding, without ratification by that official. And a suspension of the order by the surgeon-general was not a revocation or disapproval. *Parish v. United States*, 100 U. S. 500.

32. The act of June 2, 1862 (12 Sts. 411), requiring contracts for military supplies to be in writing, does not preclude an officer in authority

**UNITED STATES — LIABILITY — continued.**

from accepting delivery of supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid; and, if otherwise, the receipt and use of the supplies after the day would bind the government to pay their value, to be estimated, in the absence of other evidence, at the price fixed by the contract. *Salomon v. United States*, 19 Wal. 17.

33. Under authority given by the secretary of the treasury to supervising special agents to enter into written contracts in relation to certain matters, an assistant special agent cannot bind the government by a verbal contract. *Camp v. United States*, 113 U. S. 643.

34. The United States is not responsible for the laches or the wrongful acts of its officers. *Hart v. United States*, 95 U. S. 316.

35. The illegality of a transaction which is, in effect, a private sale, without survey, inspection, or appraisal, at a grossly inadequate price, of old material obtained from breaking up ships of war, is not cured by the settlement of the buyer's accounts by the officers of the navy department, nor by lapse of time. *Steele v. United States*, 113 U. S. 128.

36. On a suit against the sureties on the official bond of a postmaster, it is no defence that the government, through its agent, had full notice of the defalcation and embezzlement of government funds by the postmaster, and, notwithstanding such knowledge, negligently permitted him to remain in office, and so enabled him to commit the embezzlement and default complained of. *Jones v. United States*, 18 Wal. 662.

37. The government is not bound by the act of its agent, unless it clearly appear that he acted within the scope of his authority, or was employed as a public agent to do, or was held out as having authority to do, such act. *White-side v. United States*, 93 U. S. 347.

38. The same rule applies to erroneous declarations of a public officer, arising in mistake of fact. *Lee v. Munroe*, 7 Cranch, 366.

39. The government is not estopped to deny the validity of unauthorized acts of a military officer assuming to act in other than a military capacity, a lease, for instance, by an assistant quartermaster of property, for the use of the quartermaster's department, however beneficial such acts may have been. *Filor v. United States*, 9 Wal. 45.

40. — *Liability for Interest — In general, not liable.* Semble that the court does not sanction the allowance of interest on claims against the government. *Gordon v. United States*, 7 Wal. 188.

41. Where a just claim against Virginia, for military supplies furnished during the revolution, which had become a just claim against the United States instead, through the assumption by the United States of certain claims, in consideration of the cession by Virginia of the northwestern territory, was referred by special act to the court

**UNITED STATES — LIABILITY — continued.**

of claims with direction for settlement, according to the rules and regulations theretofore adopted by the United States in the settlement of like cases, and without regard to the statute of limitations, it was held, that as the claim would have been within the purview of an earlier act, which allowed interest on similar claims, but for its being within the bar of a proviso not in any way affecting its merits, interest should be allowed, although such allowance is not according to the usages of the treasury department, in the absence of special legislation authorizing it. [CLIFFORD and HUNT, JJ., dissenting.] *United States v. McKee*, 91 U. S. 442.

42. Where, under the act of July 28, 1866, § 3 (14 Sts. 329), the court grants a certificate that there was probable cause for an act of a federal officer for which judgment is rendered against him, the amount payable out of the treasury does not include interest on the judgment accrued before the certificate was given. *United States v. Sherman*, 98 U. S. 565.

**Contract — Liable on Implied Contract for Property taken to its Use, when.**

See COURT OF CLAIMS — JURISDICTION, 2-7.

**Money in Hands of Disbursing Officer — Liability to Attachment.**

See ATTACHMENT, 8.

**Proceeds of Abandoned and Captured Property — Liability therefor.**

See ABANDONED AND CAPTURED PROPERTY.

**Property not Exempt from Lien for Salvage Services.**

See SALVAGE.

**Property Stolen from Friendly Indians, etc. — Liability therefor.**

See INDIANS, 26.

**Refusal to receive and pay for what it has agreed to purchase — Liability.**

See COURT OF CLAIMS — JURISDICTION, 9.

**UNITED STATES — LIMITATION — United**

*States not bound by State Statutes of Limitation — No Adverse Possession against it.* The United States is not bound by a state statute of limitations, whether named therein or not. *Smith v. United States*, 5 Pet. 292; *United States v. Thompson*, 98 U. S. 486.

2. The provision of the judiciary act that the laws of the several states shall be regarded as rules of decision in the federal courts, has no application to the matter. *United States v. Thompson*, 98 U. S. 486.

3. There can be no adverse possession to set the statute in motion against the title of the government. *Lindsey v. Miller*, 6 Pet. 666.

4. A trespasser on public lands can acquire no title by his possession as against the United States. *Jourdan v. Barrett*, 4 How. 169.

**UNITED STATES — PRIORITY OF PAYMENT —**

*Construction of Statute — What it confers — What Debtors embraced — Right, how lost, and how enforced, etc.*

See pl. 1-31.

*Surety's Right of Subrogation — Suits by Government against Principal — Suits by Surety against Principal in Name of Government.*

See pl. 32-34.

1. — *Construction of Statute — What it confers — What Debtors embraced — Right, how lost, and how enforced, etc.*] Congress has power to make a law giving a preference to the United States in cases of insolvency of its general debtors, as well as of persons accountable for public money. *United States v. Fisher*, 2 Cranch, 358.

2. Section 5 of the act of March 3, 1797 (1 Sts. 512), giving such preference, applies to both classes of government debtors. *Ib.*

3. The statutes giving the government a right to priority of payment should receive a fair and reasonable interpretation, according to the just import of their terms. *United States v. North Carolina State Bank*, 6 Pet. 29.

4. Under that act the United States is entitled to a priority of payment, but not to a lien. *United States v. Hooe*, 3 Cranch, 73; *Beaston v. Farmer's Bank*, 12 Pet. 102.

5. Mere inability to pay all his debts does not bring one within the provision of the act. *United States v. Hooe*, 3 Cranch, 73.

6. The assignment mentioned is of all the property of the debtor, leaving him in a state equivalent to technical insolvency. *Ib.*

7. The insolvency necessary under the act of 1797 and the act of March 2, 1799, § 65 (1 Sts. 676), to give the United States a priority, is a legal insolvency, and not a mere failure or inability to pay. *Prince v. Bartlett*, 8 Cranch, 431; *Thelusson v. Smith*, 2 Wheat. 396; *Conard v. Atlantic Insurance Co.*, 1 Pet. 386; *Beaston v. Farmer's Bank*, 12 Pet. 102.

8. The priority given by the act of 1797 did not extend to a debt contracted before, although the balance was adjusted at the treasury after, the act was passed. *United States v. Bryan*, 9 Cranch, 374.

9. The right of preference given by the act of 1799 cannot reach such of the debtor's estate as the debtor has conveyed to a third person in good faith, or as he has mortgaged to secure a debt, or as has been seized in execution, and is so divested out of the debtor before the accrual of that right. *Thelusson v. Smith*, 2 Wheat. 396; *Conard v. Atlantic Insurance Co.*, 1 Pet. 386; *Conard v. Nicoll*, 4 Pet. 291.

10. But it will take precedence of the lien of a judgment thereon, in a case coming within the act. *Thelusson v. Smith*, 2 Wheat. 396. See *Conard v. Atlantic Insurance Co.*, 1 Pet. 386.

11. A demand by the United States for the proceeds of trust bonds unlawfully converted is a

**UNITED STATES — PRIORITY OF PAYMENT — continued.**

demand arising on an implied contract, or may be treated as such by a waiver of the conversion, and may, therefore, independently of the act of March 3, 1863 (12 Sts. 765), giving to the court of claims jurisdiction of set-offs, etc., be set off to a claim by the assignee in insolvency of the person against whom it arises for pay for property of the insolvent sold by the assignee; and this, although the amount of such proceeds has not been judicially ascertained, as it may be stated with certainty and the interest may be ascertained by computation. *Allen v. United States*, 17 Wal. 207.

12. An assignment for the benefit of creditors, to entitle the United States to a priority under the act of 1799, must be of all the debtor's property. *United States v. Howland*, 4 Wheat. 108.

13. And if it do not purport to be of all, the burden of proving that it in fact is so, is on the government. *Ib.*

14. The priority under the act of 1799 is a right to prior payment out of the funds in the hands of assignees, and does not prevent the property assigned from vesting in them, nor affect a mortgage of part of the debtor's property made to secure a *bona fide* debt. *Conard v. Atlantic Insurance Co.*, 1 Pet. 386; *Conard v. Nicoll*, 4 Pet. 291.

15. A judgment obtained by the government after the debtor has filed his petition in insolvency, but before he has made an assignment, is entitled to priority. *Hunter v. United States*, 5 Pet. 173.

16. The right of the government to priority in case of a general assignment by its debtor extends to a bond for duties, executed before, but payable after, the assignment. *United States v. North Carolina State Bank*, 6 Pet. 29.

17. On an assignment by an insolvent firm for the benefit of its creditors, the government can have no right to a priority for the payment of the debt of one of the partners, the interest of a partner being his share only of what may remain after payment of the partnership debts. *United States v. Hack*, 8 Pet. 271.

18. An attachment of a fund at suit of a private creditor, by a writ in the nature of an execution, is not displaced by a subsequent attachment at suit of the United States. *Beaston v. Farmers' Bank*, 12 Pet. 102. And see *Prince v. Bartlett*, 8 Cranch, 431.

19. If the assignees of an insolvent debtor have notice of a claim of the United States, an order of a state court will not protect them in distributing the fund to other creditors. *Field v. United States*, 9 Pet. 182.

20. If any of the property come to their hands subject to liens, the liens must be satisfied out of that property, not out of the general fund. *Ib.*

21. The assignees are liable to the United States only for money received, not for the price of goods sold on an unexpired credit. *Ib.*

**UNITED STATES—PRIORITY OF PAYMENT—**  
*continued.*

22. The word *person*, in section 5 of the act of 1797, held inclusive of corporations. [STORY, McLEAN, and BALDWIN, JJ., dissenting.] *Beas-ton v. Farmer's Bank*, 12 Pet. 102.

23. The appointment of a receiver in a suit brought merely for the collection of a debt is not such a transfer of the debtor's property as is contemplated by the statute. *Ib.*

24. One who obtains from a disbursing officer public moneys without right thereto, and with knowledge that they are such, becomes "indebted" to the United States, within the meaning of section 5 of the act of 1797, and, in the event of his insolvency, the United States is entitled to priority of payment. *Bayne v. United States*, 93 U. S. 642.

25. Under the act of 1797, the United States is entitled to a preference in the distribution of a bankrupt's effects in this country, although the debt was contracted by a foreigner in a foreign country; and, that preference being preserved by section 62 of the bankrupt act of 1800 (2 Sts. 36), it is not waived by proving the debt under the commission of bankruptcy and voting for an assignee. *Harrison v. Sterry*, 5 Cranch, 289.

26. Under section 5 of the act of 1797, which enacts that where there is a debt and bankruptcy the United States shall have priority of payment, and the bankrupt act of 1867, which declares that it shall be first paid, it makes no difference in the right to such priority whether the debtor is solely liable or only jointly liable with others, nor where the debt is contracted. *Lewis v. United States*, 92 U. S. 618.

27. Where, therefore, a London firm, some of the members of which are resident in this country, and here partners in another firm, is indebted to the United States, and those partners here become bankrupt, the United States is entitled to priority of payment out of their separate property. *Ib.*

28. And it need not prove the debt in bankruptcy, nor pursue the partnership effects of the London firm, before filing a bill in the circuit court against the trustee in bankruptcy. *Ib.*

29. Section 3466, Rev. Sts., which is substantially a copy of section 5 of the act of 1797, is inapplicable where the debtor is an insolvent national bank; this provision and those of the national banking act being repugnant to one another, the former must yield. Nor is this construction affected by the fact that the bankrupt act gives the United States priority. *Cook County National Bank v. United States*, 107 U. S. 445.

30. Neglect of a public officer to retain money applicable in his hand to payment of the debt of a public debtor does not bar the claim, nor defeat the right to priority of payment out of funds in the hands of the debtor's assignee in insolvency. *Hunter v. United States*, 5 Pet. 173.

31. The right of the United States to priority of payment may be assisted by bill in equity,

**UNITED STATES—PRIORITY OF PAYMENT—**  
*continued.*

when the debtor is insolvent and the funds are in the hands of an assignee, the remedy at law being inadequate. *Ib.*

32. — *Surety's Right of Subrogation—Suits by Government against Principal—Suits by Surety against Principal in Name of Government.* A surety who pays a debt due to the government is subrogated to the government's right to priority. *Ib.*

33. Although the government have money in the treasury belonging to a surety, it may agree to hold it without a final appropriation to the payment of the debt, and bring an action against the principal, for the benefit of the surety; this accords with the purpose of section 65 of the act of 1799, which declares that a surety paying a bond for duties shall have the priority reserved to the United States. *Meredith v. United States*, 13 Pet. 486.

34. A surety who, on payment, claims the right to be substituted, in insolvency proceedings against the estate of the principal, to the priority of the United States, under Rev. Sts. § 3468, conferring such right on a surety who pays the amount due on a bond given to the United States, cannot sue in the name of the United States. *United States v. Ryder*, 110 U. S. 729.

*Right thereto—When it exists.*

See BANK, 15, 16.

**UNITED STATES—SUITS—When may sue—**  
*Need not give Bond—Effect of Appearance by Attorney-General.*

See pl. 1-10.

*Exemption from Suit and from Judgment—*  
*What constitutes a Suit—Miscellaneous Matters.*

See pl. 11-28.

1. — *When may sue—Need not give Bond—Effect of Appearance by Attorney-General.* The United States may sue in its own name in all cases of contract in which the law provides no other remedy. *Dugan v. United States*, 3 Wheat. 172.

2. The United States may sue at law in its own name on a chose in action assigned to it. *United States v. Buford*, 3 Pet. 12.

3. It is to be presumed that a bill of exchange indorsed to the treasurer of the United States was received by him in the lawful discharge of his official duties, and the United States may sue thereon in its own name. *Dugan v. United States*, 3 Wheat. 172.

4. If a public agent pay over public money to another public agent, the United States may maintain assumpsit against the latter for money had and received. *United States v. Buford*, 3 Pet. 12.

5. A bill of information in the name of the district attorney, in behalf of the United States,



**UNITED STATES — SUITS — continued.**

may be valid, but the correct practice is to bring all suits in which the United States is the real party plaintiff in its name. *Benton v. Woolsey*, 12 Pet. 27.

6. The United States has power to hold property, and therefore may have the ordinary remedies for its protection, — trespass *quare clausum*, for instance, for entering and cutting trees on the public lands. *Cotton v. United States*, 11 How. 229.

7. Or replevin for the timber so cut and carried away. *United States v. Cook*, 19 Wal. 591.

8. Under Rev. Sts. § 1001, which provides that when process issues from a circuit court at suit of the United States no bond for prosecution, etc., shall be required, none need be given where the suit is brought for the recovery of personal chattels in specie in a district where by the law of the state, as, for instance, in Alabama, such a bond is required. *United States v. Bryant*, 111 U. S. 499.

9. Entry of appearance of the attorney-general, by the clerk, at the first term, in accordance with an established practice, will conclude the government and cure any defect in the form of process, if the attorney-general do not move at that term to strike out the appearance. *Farrar v. United States*, 3 Pet. 459.

10. In general, where the United States is a party and is represented by the attorney-general, counsel will not be heard in opposition on behalf of any other department; but the rule was here departed from, the argument having proceeded on the supposition that counsel would be heard. *The Gray Jacket*, 5 Wal. 370.

11. — *Exemption from Suit and from Judgment — What constitutes a Suit — Miscellaneous Matters.* *Audita querela* is a regular suit, and therefore does not lie against the United States. *Avery v. United States*, 12 Wal. 304.

12. A bill against the United States for an injunction to restrain the enforcement of a judgment on the ground of payment, cannot be maintained, as the government is not liable to be sued, except with its consent; but the court, as a court of law, may, on motion, inquire as to the fact of payment, and order an entry of satisfaction. *United States v. McLemore*, 4 How. 286.

13. So a bill will not lie to enjoin the United States from proceeding on a judgment. *Hill v. United States*, 9 How. 386.

14. No judgment for the payment of money can be rendered against the government in any court other than the court of claims, without a special act conferring jurisdiction. *Case v. Terrell*, 11 Wal. 199.

15. Where the United States is plaintiff, no judgment can be rendered on a plea of set-off for any sum ascertained to be due to the defendant. *United States v. Eckford*, 6 Wal. 484.

16. Where, therefore, credits due the defendant exceed the amount claimed by the United

**UNITED STATES — SUITS — continued.**

States, and the jury bring in a verdict for the defendant, the refusal of the court to direct the jury to certify the amount due him will not be reviewed by the supreme court. *Schaumburg v. United States*, 103 U. S. 667.

17. If the United States be plaintiff in a suit in which, under the local practice, a verdict for the defendant for a sum in set-off is the foundation for *sci. fa.* against the plaintiff, no judgment can be rendered for the balance, nor can that writ issue, the government being exempt from suit. *Reeside v. Walker*, 11 How. 272.

18. The government, to protect its rights, need not appear to proceedings in a state court. *Field v. United States*, 9 Pet. 182.

19. Where a vessel of the United States is guilty of a maritime tort, a claim against the vessel for damages as much *exists* as if the vessel belonged to a private person; and although public policy forbids its enforcement by direct proceedings, the courts will enforce it, nevertheless, against the proceeds, where the vessel, through the affirmative action of the government, has become subject to their control; *e. g.*, against the proceeds of a vessel condemned as prize, which, in coming in for adjudication, in charge of a prize master and crew, ran afoul of another vessel and sank her. [NELSON, J., dissenting, on the ground of the non-liability of the government for the wrongful acts of its public agents.] *The Siren*, 7 Wal. 152.

20. The government in such case stands, with reference to the rights of the defendants and claimants, as do private suitors, except that it is exempt from costs and from affirmative relief beyond the demand or property in controversy. *Id.*

21. A lien on government property for salvage cannot be enforced by a proceeding which requires process against the government, nor by one which requires that the property be taken from its possession; but possession, to obstruct proceedings, must be actual, not merely constructive, *e. g.*, not the possession which it has while the property is in the possession and under exclusive control of a common carrier who has agreed to carry and deliver to a government agent. *The Davies*, 10 Wal. 15.

22. The government cannot be compelled by an order for restitution to refund its portion of the proceeds of a confiscation sale. *Ex parte Morris*, 9 Wal. 605.

23. Neither a receiver of a national bank, the operations of which have been suspended by the comptroller of the currency for causes specified in the national banking act, nor the comptroller of the currency, can submit the government to the jurisdiction of the ordinary courts by appearing and answering to a bill to ascertain a debt due from the bank to the government, to charge the government, and to enjoin the complainant from making a dividend until after payment of the complainant's claim. *Case v. Terrell*, 11 Wal. 199.

**UNITED STATES — SUITS — continued.**

24. A judgment in ejectment against those who assert title in the United States, and possession as its officers and agents, does not estop the United States, although the district attorney and additional counsel employed by the secretary of the treasury appear, and the title to the property is contested, and although, under the law of the state, a judgment in ejectment against a tenant estops the landlord if he has notice of the suit. The United States cannot be sued without its consent, and consent is not implied in such a case. *Carr v. United States*, 98 U. S. 433.

25. The rule that, in general, the United States cannot be sued without its consent, has no application to a suit against officers or agents of the United States holding for public uses possession of property of which the plaintiff claims the ownership, although the United States, through the attorney-general, formally interpose and suggest that the defendants hold for the government, and move that the suit abate. [WAITE, C. J., and BRADLEY, WOODS, and GRAY, JJ., dissenting.] *United States v. Lee*, 106 U. S. 196. And see *Cunningham v. Macon & Brunswick Railroad Co.*, 109 U. S. 461.

26. *Semble* that the United States is not concluded by the judgment, but may resort to its legal remedy as by a bill to quiet title or an ejectment. *United States v. Lee*, 106 U. S. 196.

27. As the United States cannot be sued except by its own consent, it may attach to the exercise of the privilege such conditions as it chooses; as, for instance, that, when sued in the court of claims, it may plead any set-off, counter-claim, etc. *McElrath v. United States*, 102 U. S. 426.

28. The United States is never liable for costs. *United States v. Barker*, 2 Wheat. 395. *The Antelope*, 12 Wheat. 546; *United States v. McLemore*, 4 How. 286; *United States v. Boyd*, 5 How. 29.

*Action for Interest fraudulently obtained — Right.*

See ASSUMPSIT, 17.

*Appeal from Court of Claims — Right.*

See SUPREME COURT — JURISDICTION, 76 *et seq.*

*Appeal from Decree granting Injunction to stay a Treasury Distress-warrant.*

See APPEAL AND ERROR — JURISDICTION, 14.

*Burden in Action for a Penalty for Fraud on the Revenue, on Government, to make out a Case beyond Reasonable Doubt.*

See INTERNAL REVENUE — PENALTIES AND FORFEITURES, 2.

*Common Right to Set-off.*

See RECEIVER OF PUBLIC MONEY, 17, 18.

*Execution at Suit of United States not discharged by Decree under State Insolvent Laws.*

See INSOLVENCY, 18.

**UNITED STATES — SUITS — continued.**

*Federal Courts — Whether they have Common-law Jurisdiction of Offences against.*

See FEDERAL COURTS — JURISDICTION, 5.

*Intervention in Suits between States to settle Boundary.*

See STATES — SUITS, 37.

*Lands — Suits to vacate Patents — Authorization by Attorney-General.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 232.

*Parties — Contract with Government — Fraud — Remedy against Co-contractor.*

See CONTRACT — WHAT CONSTITUTES, 64.

*Proceeding by Information when sustained, although it should have been by Bill in Equity.*

See EQUITY PLEADING — DEMURRER, 9.

**UNITED STATES BANK — Charter — Construction, Validity, and Effect.**

Among the implied powers given to congress by the constitution is the power to incorporate a national bank to aid in the fiscal operations of government. The act of April 10, 1816, incorporating the bank of the United States (3 Sts. 266) was, therefore, pursuant to the constitution. *McCulloch v. Maryland*, 4 Wheat. 316.

2. That bank had a constitutional right to establish its branches within any state. *Ib.*

3. Its charter did not restrain it from purchasing promissory notes. *Fleckner v. United States Bank*, 8 Wheat. 338.

4. And were it otherwise, it seems that only the government could urge the objection. *Ib.*

5. The giving of the notes of a state bank and a credit at that bank in exchange for the note of a person, held not a dealing or trading within the prohibition in the charter of the Bank of the United States. *United States Bank v. Waggener*, 9 Pet. 378.

*Forgery — Punishment.*

See COUNTERFEITING.

*Suits under its Charter, in Federal Courts.*

See CIRCUIT COURTS — JURISDICTION, 40-42.

*Taxation by States — Exemption — Federal Agency.*

See TAX — POWER, 62 *et seq.*

**UNITED STATES COMMISSIONER — Power under Fugitive Slave Law of 1850 to examine and commit.**

See SLAVERY, 40.

**USAGE — In general.**

See CUSTOM AND USAGE.

**USE AND OCCUPATION — Action therefor — In general.**

See LANDLORD AND TENANT, 37, 38.

**USE AND OCCUPATION — continued.**

*Premises seized and used by Government — Suit in Court of Claims.*

See **COURT OF CLAIMS — JURISDICTION**, 7, 8.

**USES — Decision of State Court as to whether Statute of Uses is Part of Common Law of State — Followed by Federal Courts.**

See **FEDERAL COURTS — STATE LAWS, RULES OF DECISION**, 82.

*Statute of, as affecting Trusts — Use upon a Use, etc.*

See **TRUST — CREATION AND CONSTRUCTION**, 13 *et seq.*

**USURY — Constitutionality and Construction of Usury Laws.**

See pl. 1, 2.

*What constitutes Usury — In general.*

See pl. 3-17.

*What does not constitute Usury — In general.*

See pl. 18-32.

*How proved — Questions of Law and Fact — Conflict of Laws — Relief — Set-off.*

See pl. 33-55.

1. — *Constitutionality and Construction of Usury Laws.*] Usury laws, unless retroactive in their effect, do not impair the obligation of contracts. *Sturges v. Crowninshield*, 4 Wheat. 122; *Bacon v. Howard*, 20 How. 23.

2. A statute which, like that of Texas, declares an usurious contract void as to the interest has the effect not to render the contract so far absolutely void (the word "void" having there the effect that it often has where it refers to acts *mala prohibita*), but voidable, and to enable the promisor to resist recovery of the interest; and the repeal of such a law without a saving clause operates retrospectively, and is not unconstitutional either as impairing the obligation of a contract or as interfering with vested rights. *Ewell v. Daggs*, 108 U. S. 143.

3. — *What constitutes Usury — In general.*] To constitute usury, there must be an intention, knowingly, to contract for or take usurious interest. *United States Bank v. Waggener*, 9 Pet. 378.

4. To constitute usury, there must be either a loan on usurious interest, or the taking of more than legal interest for the forbearance of a debt or sum due. *Nichols v. Fearson*, 7 Pet. 103; *Hogg v. Ruffner*, 1 Black. 115.

5. The statutes against usury forbid not only the direct taking of interest at more than the lawful rate, but any shift or device by which it may be in fact secured. *Scott v. Lloyd*, 9 Pet. 418; *Omaha Hotel Co. v. Wade*, 97 U. S. 13.

6. If a charge for exchange be a mere cover for usury, the contract will be usurious. *Andrews v. Pond*, 13 Pet. 65.

**USURY — continued.**

7. If an agent who, by permission of his principal, has sold eight per cent stock, apply the money to his own use, and being pressed for payment, give a mortgage conditioned for repayment of the amount with eight per cent interest thereon, it is usury. *De Butts v. Bacon*, 6 Cranch, 252.

8. Where A. lent money to B., who lent it in turn at usurious interest, and agreed to pay A. "the same interest" he received, it was held that the contract was usurious, and that an indorser of B.'s note to A. might defend on that ground. *Levy v. Gadsby*, 3 Cranch, 180.

9. Although a *bona fide* purchase of an annuity or rent charge on terms such as to give the purchaser an income from his investment greater than the lawful rate of interest is not usurious, yet if the transaction be in fact a loan, and the form of an annuity be resorted to merely to evade the law, it is usurious and void. *Scott v. Lloyd*, 9 Pet. 418.

10. Although a third person, considering the doubtful credit of the drawee, may lawfully buy a bill at a discount greater than the market rate of exchange, yet if a creditor take from his debtor a time-bill payable in another place for a sum greater than the market value of a good bill for the amount of the debt with lawful interest, the contract will be usurious. *Andrews v. Pond*, 13 Pet. 65.

11. A contract which imposes any loss on the borrower after providing for repayment of the sum lent with interest, is usurious. *United States Bank v. Owens*, 2 Pet. 527.

12. If a bank be forbidden to take more than six per cent interest, a contract reserving more is void, although not so declared in terms. *Ib.*

13. Thus, a contract to repay a loan of depreciated bills in current money to an equal nominal amount, with lawful interest, is usurious. *Ib.*

14. Under a statute declaring an usurious contract to be void, the indorsee of a valid promissory note, indorsed as collateral security for an usurious loan, cannot maintain an action thereon, although the loan be paid. *Gaither v. Farmers' & Mechanics' Bank*, 1 Pet. 37.

15. A contract usurious in its inception, but not void, may be a valid basis for a new contract in which the transaction is freed from all usurious taint. *De Wolf v. Johnson*, 10 Wheat. 367.

16. No subsequent confirmation of an usurious contract, nor any new contract stipulating to pay the debt, with the usurious interest, will make the contract valid. *Moncure v. Dermott*, 13 Pet. 345.

17. A new security given for a loan originally usurious is infected with usury. *Walker v. Bank of Washington*, 3 How. 62.

18. — *What does not constitute Usury — In general.*] Deduction of interest at the ordinary legal rate, by way of discount, from the sum to become due on a bill or note, is not usurious. *Fleckner v. United States Bank*, 8 Wheat. 338; *Thornton v. Bank of Washington*, 3 Pet. 36.

**USURY — continued.**

19. The mere fact that the loan was made in depreciated bank-notes to an amount equal only nominally to the amount of the note by which the loan was witnessed, will not establish usury. *United States Bank v. Waggener*, 9 Pet. 378.

20. A *bona fide* purchase of a rent-charge, with a right of extinguishment for a fixed sum after a certain date, is not usurious, although the effect be to give the purchaser a return for his money greater than the interest allowed by law, unless it be a mere device to cover an usurious loan. *Lloyd v. Scott*, 4 Pet. 205.

21. A loan at more than the lawful rate of interest, depending on a contingency which hazards both principal and interest, is not usurious. *Conard v. Nicoll*, 4 Pet. 291.

22. If a bank agree to discount a note, and receive it and allow the maker to draw checks against the proceeds thereof, it is not usurious to treat the loan as made on the day the note was received, although the proceeds were not put to the credit of the borrower until a subsequent day, because the maker had not furnished collateral security which he had agreed to give. *Walker v. Bank of Washington*, 3 How. 63.

23. Exchange at the current rate added to the legal interest does not constitute usury, it being not for forbearance, but for receiving payment where the money paid will be less valuable. *Buckingham v. McLean*, 13 How. 151.

24. The payee of a note valid at its inception is liable in an action thereon by a purchaser and indorsee thereof, although the note was discounted when sold at a greater than the lawful rate. *Nichols v. Fearson*, 7 Pet. 103.

25. Bonds issued by a corporation in payment for the completion of its works are not necessarily usurious under the law of Indiana, though they purport to be for a loan, and a large profit on the work was contemplated by both parties to the contract. *White Water Valley Canal Co. v. Vallette*, 21 How. 414.

26. A contract for the sale of land on long credit at a price increased by reason of the credit by a sum much greater than the lawful interest, is not usurious; and it will make no difference that the sale was made as a means of settling an indebtedness between the parties about which there was difficulty. *Hogg v. Ruffner*, 1 Black, 115.

27. Where the statute fixes the rate of interest per annum, a contract may lawfully provide for payment at that rate semi-annually. *Meyer v. Muscatine*, 1 Wal. 384.

28. Where a promise to pay a sum amounting to interest above the legal rate depends on a contingency, — not on the happening of a certain event, — the loan is not usurious. *Spain v. Hamilton*, 1 Wal. 604.

29. A sale of securities at any rate of discount that the parties may agree upon is not usurious. *Junction Railroad Co. v. Ashland Bank*, 13 Wal. 236.

**USURY — continued.**

30. In Illinois, under the statutes in force in January, 1857, a contract was not rendered invalid by an agreement for interest at a rate greater than the lawful one of six per cent. *Hansbrough v. Peck*, 5 Wal. 497.

31. A contract not usurious in its inception cannot be invalidated by any subsequent usurious transaction. *Nichols v. Fearson*, 7 Pet. 103.

32. The defendant having received an accommodation bond from the testatrix and sold it at a large discount, covenanted with the testatrix to pay the bond, with all interest to accrue thereon. In an action by the executor on that bond, payment of the bond by the plaintiff was alleged, and the defendant pleaded usury. It was held that if the sale of the bond was *bona fide* there was no usury, although at a rate of discount greater than the legal rate of interest; and that even if usury existed, it was no defence, if it existed without the knowledge of the testatrix or of the plaintiff, and the plaintiff had no notice of it before he paid the bond, and was not informed that the defendant wished to contest payment on that ground. *Moncure v. Dermott*, 13 Pet. 345.

33. — *How proved — Questions of Law and Fact — Conflict of Laws — Relief — Set-off.* Usury is not to be inferred from the renewal of a note on the day before its maturity, no contract being proved. *Thornton v. Washington Bank*, 3 Pet. 36.

34. If the contract do not stipulate for it, on its face, it must be proved that there was some agreement or shift *dehors* the written contract, to cover it. *United States Bank v. Waggener*, 9 Pet. 378.

35. Usury being a defence that must be strictly proved, it will not be presumed that a note bearing interest from a day previous to the day of its date was for money lent on the later of those days. *Ewing v. Howard*, 7 Wal. 499.

36. In Virginia, one cannot avail himself of the defence of usury, without averring and proving it, and he must pay the principal of his debt. *Kesner v. Trigg*, 98 U. S. 50.

37. If the question of usury depend on written papers, its determination is for the court. *Levy v. Gadsby*, 3 Cranch, 180; *Walker v. Washington Bank*, 3 How. 63.

38. And the jury are not at liberty to infer extraneous facts which would remove the taint of usury. *Levy v. Gadsby*, 3 Cranch, 180.

39. The question of whether a provision in a contract is, as claimed, a cover for usury, is properly left to the jury where the facts leave the matter in doubt; as, *e. g.*, where a commission merchant lends money to a pork-packer at legal interest, with a stipulation that the former shall be entitled to commissions on all sales, whether made by himself or by the packer. *Cockle v. Flack*, 93 U. S. 344.

40. Whether, in all the circumstances, a transaction be a *bona fide* purchase of an annuity, or a mere device to evade the law against usury, is

**USURY — continued.**

a question of fact for the jury. *Scott v. Lloyd*, 9 Pet. 418.

41. So, of whether the exchange reckoned on the drawing of a bill was intended as a cover for usury. *Andrews v. Pond*, 13 Pet. 65.

42. The invalidity of a usurious contract made with reference to the law neither of the place where it was made nor of the place where it was to be performed, the law of both places forbidding such contracts, held determinable by the *lex loci contractus*. *Ib.*

43. In general, however, whether a contract of loan on a bond is usurious depends on the law of the place where the bond is payable. *Junction Railroad Co. v. Ashland Bank*, 12 Wal. 226.

44. A draft drawn on a resident of another state, and there accepted for the accommodation of the drawer and returned to him to be negotiated in the state where the drawer lives, on an understanding that, although by the terms of the acceptance it is payable in the state of acceptance, it shall be taken up at maturity by the drawer, is governed by the law of the state where the drawer lives and where it is negotiated; and if negotiated to one who has no knowledge of the facts, except such as he gathers from the draft, the purchaser may maintain an action thereon, if it be valid by the law of that state, although he purchased at a rate of discount usurious by the law of the state of acceptance, and by the law of that state contracts are void for usury. *Tilden v. Blair*, 21 Wal. 241.

45. A contract to pay interest after the rate either of the place at which it is made or of that at which it is to be performed, will not be usurious because for interest at a rate greater than the lawful rate of the other place, unless made with intent to avoid the penalty of an usurious contract at that place. *Miller v. Tiffany*, 1 Wal. 298.

46. A contract by letter for a loan of money by a commission merchant to a person engaged in business in another state, giving the lender a commission on all sales of the products of the business, whether made through the lender or not, held not usurious because it reserved interest at a rate unlawful in the state of the lender, but lawful in that of the borrower, where the suit arose. *Cockle v. Flack*, 93 U. S. 344.

47. He who seeks to be relieved from an usurious contract must offer to pay the principal and the legal interest. He who seeks the aid of a court of equity must offer to do equity. *Brown v. Swann*, 10 Pet. 497; *Stanley v. Gadsby*, 1d. 521.

48. Under a usury law which forbids the taking of interest at a greater than a certain rate, but does not avoid the securities, a court of equity will not refuse its aid in a suit to recover the principal. *De Wolf v. Johnson*, 10 Wheat. 367.

49. The general rule of equity, that a complainant can have relief for usury only to the extent of the excess, applies where both parties are claimants of a fund, as, although each party may

**USURY — continued.**

be in some sense an actor, the defendant cannot be deemed in such sense a complainant as to incur the penalty of one who seeks to recover an usurious debt, i. e., the loss of the entire claim. *Spain v. Hamilton*, 1 Wal. 604.

50. Where one sues on the consideration for which a note was given, using the note merely as evidence, he can recover lawful interest, although the note be for interest at an unlawful rate, and governed by a law which denounces upon such contracts a forfeiture of all interest whatever. *Newell v. Nixon*, 4 Wal. 572.

51. Where a bank by its charter is forbidden to take more than a certain rate of interest, but no penalty is prescribed, and the effect of usury upon the contract is not declared, its effect must be determined by the general rules of law. A court of equity will enable the borrower to recover the excess beyond legal interest, but no more; and the rule applies as well to accommodation paper. *Tiffany v. Boatman's Savings Institution*, 18 Wal. 375.

52. If under the law an usurious contract be void, a purchaser of land charged with an usurious loan by way of rent-charge may set up the usury in defence to a distress for rent in arrears. *Lloyd v. Scott*, 4 Pet. 205.

53. Where a statute, like that of the District of Columbia (Rev. Sts. §§ 715, 716), provides that one who contracts to receive more than a certain rate of interest shall forfeit the whole of the interest so contracted for, and shall recover only the principal, and that if one receives more than a certain rate, the party paying it may recover back all the interest paid by action brought within a year, the defendant in an action brought to recover a debt cannot set off, either under the statute or at common law, usurious interest paid more than a year before suit brought. *Carter v. Carrisi*, 112 U. S. 478.

54. In Louisiana, usurious interest cannot be reclaimed, nor imputed to the principal, unless a suit for its recovery be commenced, or a plea of usury be set up, within twelve months after the payment thereof. *Cook v. Lillo*, 103 U. S. 792; *Walsh v. Mayer*, 111 U. S. 31.

55. If the right is not asserted within the statute period, it ceases to exist, and cannot be enforced in another state where there is no limitation. The provision requiring an assertion of the right within a certain time is a qualification of the right, and not a part of the law of the remedy merely, to be governed by the law of the forum. *Walsh v. Mayer*, 111 U. S. 31.

*Defence—Grantee of Equity of Redemption cannot set up Usury in Loan.*

See MORTGAGE—GRANTEE OF EQUITY, 1.

*Defence—Not first made on Appeal or Error.*

See APPEAL AND ERROR—PROCEEDINGS ABOVE, 288.

*National Banking Act—Usury under.*

See NATIONAL BANK, 74-81.

**UTAH** — *Who may prosecute for Violations of the Law.*] Under the organic act of September 9, 1850 (9 Sts. 453), organizing the territory of Utah, the attorney-general of the territory, elected by its legislature, and not the district attorney of the United States, appointed by the president, is

**UTAH** — *continued.*

entitled to prosecute for violations of the laws of the territory, the act being susceptible of that construction, and the construction being supported by usage. *Snow v. United States*, 18 Wal. 317.

## V.

**VARIANCE** — *Between Pleading and Proof* — *In general.*

See **PLEADING** — **VARIANCE.**

*How taken Advantage of.*

See **TRIAL** — **INTRODUCTION OF EVIDENCE**, 21, 22.

*Indictment for receiving Stolen Note — Evidence of Note bearing Interest at Different Rate.*

See **INDICTMENT**, 5.

*Ordinary Rules have no Application in Admiralty.*

See **ADMIRALTY** — **PLEADING**, 21, 22.

*Writ and Declaration — Matter of Abatement.*

See **PLEADING** — **DILATORY PLEAS**, 6;  
**PLEADING** — **PLEA TO MERITS**, 8.

**VENDOR AND PURCHASER** — *Bona Fide Purchaser — In general.*

See **VENDOR AND PURCHASER** — **BONA FIDE PURCHASER.**

*In general — Contracts between, etc.*

See **VENDOR AND PURCHASER** — **IN GENERAL.**

*Vendor's Lien — In general.*

See **VENDOR AND PURCHASER** — **VENDOR'S LIEN.**

**VENDOR AND PURCHASER** — **BONA FIDE PURCHASER** — *Who is — Protection extended to*

— *Notice — What is — Constructive Notice — Rights.*] The protection extended in equity to a *bona fide* purchaser is extended to a purchaser of the legal title only, the purchaser of an equity being bound to notice a prior equity. *Shirras v. Caig*, 7 Cranch, 34; *Vattier v. Hinde*, 7 Pet. 252; *Boone v. Chiles*, 10 Pet. 177; *Hallett v. Collins*, 10 How. 174.

2. The rule which protects a *bona fide* purchaser for value applies only where the legal title has been conveyed and the purchase-money fully paid, not where the rights of the purchaser lie in an executory contract. *Villa v. Rodriguez*, 12 Wal. 323.

3. Although a court of equity may not assist to establish a merely equitable title against a *bona fide* purchaser for value, it does not follow that a plea of such purchase will avail against the

**VENDOR AND PURCHASER** — **BONA FIDE PURCHASER** — *continued.*

holder of the legal title. *Gaines v. New Orleans*, 6 Wal. 642.

4. A purchaser who takes merely a quitclaim deed is not regarded as a *bona fide* purchaser for value. *May v. Le Claire*, 11 Wal. 217; *Villa v. Rodriguez*, 12 Wal. 323.

5. What one must aver and prove to entitle himself to protection as a *bona fide* purchaser. *Wormley v. Wormley*, 8 Wheat. 421; *Boone v. Chiles*, 10 Pet. 177; *Creus v. Burcham*, 1 Black, 352.

6. A *bona fide* purchaser without notice, to be entitled to protection, must have been such, not only at the time of the contract or conveyance, but until the purchase-money was actually paid. *Wormley v. Wormley*, 8 Wheat. 421.

7. Possession is notice of an unrecorded deed, where it is open and notorious. *Lea v. Polk County Copper Co.*, 21 How. 493.

8. Open, notorious, and exclusive possession, under a claim of title, is enough to put all persons upon inquiry as to the interests, legal or equitable, of the person so in possession, and to charge them with notice of such interests. *Hughes v. United States*, 4 Wal. 232.

9. What is sufficient to affect a purchaser with notice of a prior contract of sale by the vendor. *Caldwell v. Carrington*, 9 Pet. 86.

10. In Illinois, open, visible, and exclusive possession of lands under a contract for a conveyance is constructive notice to creditors and subsequent purchasers of title thereto. *Noyes v. Hall*, 97 U. S. 34.

11. A party put by circumstances on inquiry as to a fact, is affected with constructive notice thereof. *Oliver v. Piatt*, 3 How. 333; *Harrell v. Beall*, 17 Wal. 590.

12. Notice of facts sufficient to put a party on inquiry is not, necessarily, notice of what he might learn by inquiry. Thus, it is not, when he had a right to rely on the assurances of his vendor, and so was not bound to inquire. *Boyce v. Grundy*, 3 Pet. 210.

13. To affect a purchaser for value with constructive notice, it should appear not merely that he might have acquired notice, but that he would have acquired it but for gross negligence. *Wilson v. Wall*, 6 Wal. 83.

**VENDOR AND PURCHASER — BONA FIDE PURCHASER — continued.**

14. Notice to the scrivener employed only by the grantor is not constructive notice to the purchaser. *Astor v. Wells*, 4 Wheat. 466.

15. In Ohio, a *bona fide* purchaser for value without notice will take a good title, although the vendor made the conveyance to defraud a creditor who held a prior but unrecorded mortgage, and notwithstanding the statute against fraudulent conveyances. *Ib.*

16. The equity of a *bona fide* purchase is not affected by the purchase of an outstanding legal title after notice. *Lea v. Polk County Copper Co.*, 21 How. 493.

17. A purchaser from one who took under a forged deed executed in the name of a fictitious person in whose name a decree in equity had been obtained, held to have no title which equity could protect, although a *bona fide* purchaser for value. *Sampeyreac v. United States*, 7 Pet. 222.

18. If a *bona fide* purchaser reconvey to his grantor, and he in turn convey to another who has notice, such subsequent purchaser cannot avail himself of the equity arising out of the first purchase, as on reconveyance to the original vendor the original equity attached. *Rogers v. Lindsey*, 13 How. 441.

19. Where an occupant of premises in Salt Lake City, desiring to separate from a polygamous wife who lived there with him, but desiring to have the benefit of her services, entered into a secret agreement with her that she should have a half interest in the premises if she would remain, and afterwards took a conveyance of the land without disclosing the agreement, it was held that joint occupation, in the circumstances, was not constructive notice of the wife's claim, and that she had no rights as against one to whom title had passed for value without actual notice. *Townsend v. Little*, 109 U. S. 504.

20. If a legislature make a grant of lands in fee simple, a subsequent legislature cannot take away the title of a *bona fide* purchaser for a valuable consideration from the first grantee, on the ground that the first grant was fraudulent. *Fletcher v. Peck*, 6 Cranch, 87.

21. Where one seeks to recover property from a purchaser who defends as a *bona fide* purchaser without notice, the plaintiff has the burden of proving notice. *Calais Steamboat Co. v. Scudder*, 2 Black, 372.

*Bound to see to Application of Purchase-money, when.*

See TRUST — CREATION AND CONSTRUCTION, 28 *et seq.*

*Constructive Notice of Suit — Purchase pendente Lite.*

See LIS PENDENS, 1 *et seq.*

*Notice of Lien of Former Vendor for Purchase-money.*

See VENDOR AND PURCHASER — VENDOR'S LIEN, 2.

**VENDOR AND PURCHASER — BONA FIDE PURCHASER — continued.**

*Purchaser from Executor takes with Notice of Provisions of Will — Purchaser from Administrator.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 10, 11.

*Purchaser affected by Registration and Notice.*

See DEED — REGISTRATION AND NOTICE.

*Purchaser not estopped to deny Title of Vendor — Other Purchaser.*

See ESTOPPEL, 15 *et seq.*

*Purchaser of Immovables of Succession in Louisiana — Five Years' Prescription.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 61 *et seq.*

*Sale by Executor — Purchaser not affected by Discovery of Later Will.*

See EXECUTOR AND ADMINISTRATOR — POWERS AND LIABILITIES, 59.

**VENDOR AND PURCHASER — IN GENERAL —**

*Contracts between — Construction.*

See pl. 1-6.

*Obligations, Rights, and Remedies.*

See pl. 7-26.

*Defect of Title — Defect of Quantity.*

See pl. 27-30.

*Avoidance of Contract.*

See pl. 31-43.

**1 — Contracts between — Construction.]**

A negotiation for the sale of land, held not to have resulted in a contract, the offer not having been seasonably nor substantially accepted. *Carr v. Duval*, 14 Pet. 77.

2. A contract to convey land in fee, clear of incumbrances, was held broken when the defendant at the time of the contract had only an equity of redemption under a deed of trust under which the property was afterward sold. *Metropolis Bank v. Gutschlick*, 14 Pet. 19.

3. An agreement to sell land for a specified sum, and, on payment of a part of the purchase-money, to "make a deed," is a covenant to convey a perfect title free from all incumbrances; and the vendor, suing for the purchase-money, must aver and prove that he had such a title and was ready and willing to convey it. *Washington v. Ogden*, 1 Black, 450.

4. Where an agreement to buy land is expressly "dependent on the surrender and cancellation" of a prior contract by which the proposed vendor had agreed to sell to another person, it is upon condition precedent that the vendor procure a formal deed of release, for which a mere parol understanding between him and the persons claiming under the prior contract, some of them by way of recorded deeds, that it is at an end, although after default for which the vendor might avoid it, is no equivalent. *Ib.*

**VENDOR AND PURCHASER — IN GENERAL —**  
continued.

5. In contracts for the sale of land, the promises of the vendor and the purchaser are construed to be dependent, unless a contrary intention plainly appear. *Columbia Bank v. Hagner*, 1 Pet. 455.

6. A sealed agreement for a sale of land, by which one party promises to make a deed, and the other to pay the purchase-money, a part in cash within a certain time, and the remainder in instalments, with mortgage security, is an agreement with reciprocal covenants to be concurrently performed. *Washington v. Ogden*, 1 Black, 450.

7. — [Obligations, Rights, and Remedies.] Independent of local usage, it seems that one who is to execute and deliver a deed should prepare it. *Willard v. Tayloe*, 8 Wal. 557. And see *Taylor v. Longworth*, 14 Pet. 172.

8. The rule that the vendee must prepare and tender the conveyance for execution does not prevail in Ohio. *Taylor v. Longworth*, 14 Pet. 172.

9. To maintain an action against the purchaser for not accepting the land, the vendor must aver and prove readiness and an offer to perform on the day fixed by the contract. *Columbia Bank v. Hagner*, 1 Pet. 455.

10. What amounts to a sufficient tender of performance on the part of the purchaser, where by the contract he is to deposit the purchase-money in a certain bank, and transfer the certificate of deposit to the vendor, when the bank refuses to receive the money and give such a certificate. *Secomb v. Steele*, 20 How. 94.

11. Where purchasers have given their notes for the purchase-money, the presumption is that the conveyances were made. *Lyman v. United States Bank*, 12 How. 225.

12. Where a vendor sues to recover the price of land for which notes were taken, some of which it is admitted have been paid, he is not obliged to produce the notes that have been paid. It is to be presumed that they were surrendered. *Id.*

13. A purchaser in possession under the vendor who buys up a better outstanding title cannot set it up to defeat the vendor's right to the purchase-money; he can only recoup what he has fairly paid. *Bush v. Marshall*, 6 How. 284.

14. A material misrepresentation by a vendor, although made by mistake, must be made good, specifically, if in the vendor's power, otherwise by way of damages. *McFerran v. Taylor*, 3 Cranch, 270.

15. Where one advances money in part performance of an agreement to purchase land and refuses to pay further, the other party being ready and willing to perform on his part, he cannot recover the money so advanced. *Hansbrough v. Peck*, 5 Wal. 497.

16. If the obligee of a bond obtain title in his own name for part of the land, the assignment of which to the obligor was the consideration of the

**VENDOR AND PURCHASER — IN GENERAL —**  
continued.

bond, and suffer the title to the residue to be lost by the non-payment of taxes, a court of equity will not lend its aid to carry into effect a judgment at law on the bond. *Stillern v. May*, 4 Cranch, 137.

17. If a sale of land be on condition that if the purchaser fail to comply with the terms of sale within thirty days, the land shall be resold on his account, the vendor cannot maintain an action on the contract until the deficit has been ascertained by a resale. *Webster v. Hoban*, 7 Cranch, 399.

18. The purchaser at a sale of lots in the city of Washington, held not to have acquired a fee simple in a proportionate part of an internal alley laid out for the common benefit of the lots so purchased and of other lots in the square, and entitled in equity to recover the purchase-money thereof, although the practice had been to charge the alleys proportionately upon the lots, and he knew it, and accepted conveyance without objection on that score. *Pratt v. Law*, 9 Cranch, 456.

19. If the purchaser of land on credit, in possession under a bond for a deed, suffer it to be sold for taxes, the vendor will be bound to convey only subject to the tax-title incumbrance, and is entitled to payment in full. *Bradford v. Union Bank*, 13 How. 57.

20. And if the purchaser's surety, on surrender of the original bond, procure of the vendor a new bond for conveyance to himself, the purchaser being insolvent and consenting thereto, and the vendor being ignorant of the tax sale, receiving no new consideration and intending merely to substitute the surety for the purchaser, the fact of such substitution may be proved by parol, on a bill by the vendor to rescind and enjoin a judgment against him for the purchase-money, and the bond may be so reformed as to express the real agreement. *Id.*

21. And this may be done under an answer setting up such facts, without a cross-bill. *Id.*

22. Where a contract for the sale of land, with an agreement to convey by deed of general warranty, has been executed by delivery of possession and payment of the purchase-money, the purchaser cannot, in the absence of fraud and concealment, refuse to receive a deed with proper covenants, nor go into equity for indemnity against incumbrances, especially where the incumbrances are such that it is uncertain whether anything, and if anything how much, will ever become payable thereon, but must rely on the covenants he has agreed to receive. *Refeld v. Woodfolk*, 22 How. 318.

23. Where the owner of land valuable chiefly for the timber thereon agrees to sell, the purchase-money to be paid in three annual instalments, but the purchaser to take possession, cut a certain quantity of timber each year, and pay monthly according to the amount cut, convey-



**VENDOR AND PURCHASER — IN GENERAL —**  
continued.

ance to be made on full payment, and during the term, and being in arrear the purchaser mortgages timber cut and on the land to another, who takes possession recognizing the rights of the owner and afterwards abandons, the owner may recover of the mortgagee the value of the timber so cut, if the owner enter, and remove and prepare the timber for market, and the mortgagee take it from him, time being of the essence of the original contract, and the owner having a right so to do, although the contract contain no express provision for a re-entry. *Jennison v. Leonard*, 21 Wal. 302.

24. Where one sells land agreeing that he will purchase it back at a certain price within five years, if the vendee so desires, the right of the vendee to maintain a suit for the price is fixed by his notifying the vendor, within the time, to make the purchase at the expiration of it, and by tendering a deed within a reasonable time thereafter. *Brown v. Slee*, 103 U. S. 828.

25. If one sell and convey land to a county on terms of credit which the county cannot legally agree to, the vendor's right to a reconveyance accrues, not at the expiration of the time for which credit was illegally given, but at once. *Chapman v. Douglas County*, 107 U. S. 348.

26. If a municipality, *e. g.*, a county, make a purchase of land, and take a deed of it, as it may do, and give a mortgage payable at a future definite time for the purchase-money, as it may not do, the vendor is entitled to demand a reconveyance of the land with the improvements, unless the county shall pay the purchase-money within a reasonable time to be fixed by decree, such payment being within its powers. *Ib.*

27. — *Defect of Title — Defect of Quantity.*] Defect of title by reason of an incumbrance fully known to the purchaser at the time of the sale, held no bar to an action on a promissory note given for the purchase-money. *Greenleaf v. Cook*, 2 Wheat. 13.

28. Mere defect of title in the vendor, without fraud, affords no ground for relieving a purchaser in undisturbed possession from payment of the purchase-money. *Patton v. Taylor*, 7 How. 132; *Noonan v. Lee*, 2 Black, 499. And see *Greenleaf v. Cook*, 2 Wheat. 13.

29. The vendor, in such case, is liable only to the extent of his covenants. *Noonan v. Lee*, 2 Black, 499.

30. The rule that where land is sold as for a certain quantity, equity will relieve if there be a defect of quantity, applies only to contracts for the sale of land in a settled country, not to sales of entries in a military tract, where the custom is for the vendee to take his chance of surplus or deficiency. *Dunlap v. Dunlap*, 12 Wheat. 574.

31. — *Avoidance of Contract.*] Inability of the vendor to make a good title is no ground for a decree avoiding the contract, where there

**VENDOR AND PURCHASER — IN GENERAL —**  
continued.

is an adequate remedy at law. *Hepburn v. Dunlop*, 1 Wheat. 179.

32. Incapacity of the purchaser to hold land by reason of alienage, whether ground for refusing specific performance or not, is none for a decree avoiding the contract. *Ib.*

33. An old contract to sell to a third person which has been manifestly abandoned, and so is not enforceable in equity, is not a valid objection to title which will justify avoiding the contract. *Greenleaf v. Queen*, 1 Pet. 138.

34. Nor is a claim for dower, if the purchaser knew, or had the means of knowing, of its existence, and knew that he was purchasing from a trustee. *Ib.*

35. The purchaser of land may treat the contract of sale as rescinded, if the vendor do not perform or offer to perform on the day, although he have taken possession under the contract. *Columbia Bank v. Hagner*, 1 Pet. 455.

36. If the purchaser notify the vendor that he will not be bound by the contract of sale, unless the vendor pay a sum admitted to be due on a settlement of which the contract formed a part, the contract will not be at an end on mere neglect of the vendor to adopt the alternative tendered. *Barry v. Coombe*, 1 Pet. 640.

37. Where the purchaser discovers fraud in the contract of sale, he is bound to communicate knowledge thereof to the vendor promptly, and to act consistently in reference thereto, in order to preserve his right to set the contract aside. *Boyce v. Grundy*, 3 Pet. 210.

38. A discrepancy between facts and representations in a contract for the purchase of nine hundred and fifty acres of land at twenty dollars per acre, which makes a difference of thirty-three per centum in the cost, presents a case for avoiding the contract, not for compensation. *Ib.*

39. Where a defect in the vendor's title is discovered after the sale, and is then revealed to the purchaser by the vendor, the purchaser will not be permitted to obtain the true title, and then have the contract set aside. *Galloway v. Finley*, 12 Pet. 264.

40. A conveyance set aside at the instance of the vendor for fraudulent representations as to quantity, value, and title, the vendor residing at a distance from the land, and being ignorant of the matters to which the representations related, and the purchaser residing near it, and having knowledge of those matters. *Tyler v. Black*, 13 How. 230.

41. Where a purchaser having a bond for a deed goes into possession, he holds merely as a licensee, and if he fail to pay as agreed, the vendor may treat the contract as at an end, and proceed in ejectment for the possession; and in Georgia, as in this country generally, he may proceed without giving notice to quit. *Burnett v. Caldwell*, 9 Wal. 290.

**VENDOR AND PURCHASER — IN GENERAL —**  
*continued.*

42. Where a contract for the sale of land has been executed by delivery of a conveyance and payment of the purchase-money, equity will not set it aside for defect of title, if at or before the hearing the vendor tender a perfect title, unless the complainant has suffered an injury which cannot be fairly compensated by damages. *Kimball v. West*, 15 Wal. 377.

43. Where a court of equity sets aside a contract of sale of land because of its having been induced by fraud, the grantee, if placed *in statu quo* by the return of a bond which constituted the consideration of the transaction, cannot contend that payment of the bond should be made the condition of rescission, even though the bond, by reason of the bar of the statute of limitations, may have become practically worthless. *Neblett v. Macfarland*, 92 U. S. 101.

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**VENDOR AND PURCHASER — VENDOR'S LIEN**

— *When it exists — When waived — When defeated — Effect of Transfer of Land — Effect of Transfer of Purchase money Notes — Proceedings to enforce — Parties — Defences.* In general, a vendor of land has an equitable lien for unpaid purchase-money, valid, if not waived, against the purchaser or those who hold under him with notice, and with additional reason where the deed expressly states that the purchase-money remains to be paid; and this general doctrine is recognized in Texas. *Cordova v. Hood*, 17 Wal. 1.

2. A purchaser from a grantee who holds under such a deed takes with notice, the deed being sufficient to put him on inquiry, and affecting him with knowledge of all he would have learned had he inquired. *Ib.*

3. Where the vendor has taken no separate security, equity will treat unpaid purchase-money as constituting a lien, which it will enforce if there be no intervening equity. *Chilton v. Braiden*, 2 Black, 458.

4. It makes no difference that the purchaser is a married woman, nor that she has or has not a separate estate liable for debt, the lien being incident to a valid sale. *Ib.*

5. The vendor waives the lien implied in equity for unpaid purchase-money by taking separate security. Thus if, after the first payment, he consent to rely on the notes of the purchaser,

**VENDOR AND PURCHASER — VENDOR'S LIEN**  
— *continued.*

indorsed by third persons, for the residue, the deed which had before stood as an escrow being then delivered, there is a waiver. *Brown v. Gilman*, 4 Wheat. 255.

6. An express contract that the lien shall be retained to a specified extent is a waiver of it to any greater extent. *Ib.*

7. *Semble* that a receipt by the vendor of a worthless note as part of the cash payment does not operate as a waiver *pro tanto* of his equitable lien for the purchase-money, where the note was fraudulently represented by the purchaser to be good. *Shelton v. Tiffin*, 6 How. 163.

8. A lien for purchase-money, evidenced by a note for the entire sum, is not displaced as to any sum unpaid by a surrender of the note and the receipt of a partial payment, and a new note for the residue. *Cordova v. Hood*, 17 Wal. 1.

9. Although the taking of a note with a surety from the purchaser will in general raise a presumption of intention to waive the lien and rely exclusively on the personal security, it is but a presumption, and may be rebutted by direct evidence — the positive testimony of the vendor, for instance — of a contrary intention. *Ib.*

10. If a purchaser of the interest of a settler entitled to pre-emption resell, and his purchaser agree in part consideration to pay purchase-money still due to the original vendor, the latter will have a lien in equity therefor, which the second purchaser, having taken and retained possession, and not rescinded, cannot defeat, by afterwards taking title from the government under proof of a right of pre-emption in his own name. *Thredgill v. Pintard*, 12 How. 24.

11. A vendor's lien is not necessarily barred because an action on the debt would be barred; nor is it in Arkansas. *Hardin v. Boyd*, 113 U. S. 756.

12. The lien which, if no separate security be taken, the vendor of land has for unpaid purchase-money, cannot be enforced against a trustee for creditors of the purchaser to whom the purchaser has conveyed, without notice thereof. *Bayley v. Greenleaf*, 7 Wheat. 46.

13. In Texas, an assignment of a note given for the purchase-money of real estate carries the vendor's lien. *Cordova v. Hood*, 17 Wal. 1.

14. In Texas, a vendor may proceed to enforce his lien in equity for the purchase-money, without first exhausting his remedy at law, against the personal estate of the purchaser. *Ib.*

15. Notwithstanding the pendency of an appeal taken by the defendant in proceedings to enforce a vendor's lien, the vendor may institute proceedings in another court to enforce installments falling due pending the appeal. *Marchand v. Frellsen*, 105 U. S. 423.

16. To a bill by a vendor under an agreement to sell, accompanied by a bond conditioned to convey on payment of the purchase-money, brought to foreclose the equities of the vendee and others

**VENDOR AND PURCHASER — VENDOR'S LIEN**  
— *continued.*

who claim under him, the widow, who is also the executrix of a purchaser from the vendee, and his heirs, are necessary parties. *Lewis v. Hawkins*, 23 Wal. 119.

17. The right to enforce by foreclosure a vendor's lien under an agreement to sell, and a bond conditioned to convey on payment of the purchase-money, is not affected by the fact that the vendor did not tender a deed, if the vendee was in default, and it is apparent that a tender would have been of no avail. *Ib.*

18. In a suit to enforce a lien for the purchase-money of land, where there has been no fraud and no eviction, actual or constructive, neither the vendee nor one in possession under him can controvert the vendor's title; nor can one claiming an adverse title bring it forward and have it settled in that suit, — the vendee must rely on the covenants in the vendor's deed; if there are none, in the absence of fraud, there is no redress. *Peters v. Bowman*, 98 U. S. 56.

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**WAR — In general — What constitutes — Belligerent Rights — Rights of Conquest — Rights of Neutrals — Prisoners of War.] A war may**

**WAR — continued.**

exist without any formal declaration, and between parties one of whom claims sovereign rights over the other; *e. g.*, where a party in rebellion, having cast off its allegiance and declared its independence, has raised an army, begun hostilities, and occupied a portion of the territory of the sovereign, and thereby interrupted the ordinary course of justice. [*TANEY*, C. J., and *CATRON*, *NELSON*, and *CLIFFORD*, JJ., dissenting.] *The Amy Warwick*, 2 Black, 635; *The Hiawatha*, Id.; *The Brilliant*, Id.; *The Crenshaw*, Id.

2. The mere enlistment of men, without an actual assembling of them, is not a levying of war. *Ex parte Bollman*, 4 Cranch, 75.

3. A military order cannot destroy rights already vested; as, for instance, the rights of a lease of property in a city occupied by the army during the war, the lease having been given by authority competent at the time. *New Orleans v. Steamship Co.*, 20 Wal. 387.

4. While an act of the confederate congress, declaring it to be the duty of military commanders to destroy cotton to prevent its falling into the hands of the United States, can of itself afford no protection to one seeking to justify thereunder, yet as the laws and usages of war, belligerent rights being conceded, conferred on the confederate military commanders similar authority, an order of such a commander, directing the destruction of cotton thus situated, is a justification to a soldier of the confederate army who destroyed it in obedience thereto, in a suit brought by the owner of cotton, who at the time of its destruction was a voluntary resident within the lines of the insurrection. *Ford v. Surget*, 97 U. S. 594.

5. The power of a belligerent to confiscate enemy's property, considered. *Miller v. United States*, 11 Wal. 268; *Tyler v. Defrees*, Id. 331.

6. Where one abandons his home, enters the military lines of the enemy, and is in sympathy and co-operation with the enemy, he is, during his stay, himself an enemy, and liable to be treated as such as to both person and property. *The William Bagaley*, 5 Wal. 377; *Gates v. Goodloe*, 101 U. S. 619.

7. A military commander cannot take private property to prevent it from falling into the hands of the enemy, or for public use, unless he has reasonable ground to believe the danger to be immediate and impending, or the necessity to be extremely urgent. *Mitchell v. Harmony*, 13 How. 115.

8. Thus, he cannot take it merely to insure the success of a hazardous expedition to a distant place. *Ib.*

9. If taken for the use of such an expedition, neither an offer to return it at the place to which it was taken nor the efforts of the owner to save it from loss there will divest his right of action. *Ib.*

10. During the war between Spain and her South American colonies, and before the ac-

**WAR — continued.**

knowledge of the independence of the latter, they were by us deemed belligerents, and entitled to belligerent rights, including the right of capture. *The Santissima Trinidad*, 7 Wheat. 283.

11. On conquest and cession of the conquered territory by treaty, the conqueror cannot hold a citizen thereof, who joined his forces, to have forfeited thereby his rights to property in such territory. *United States v. Reading*, 18 How. 1.

12. It is a necessary incident to conquest that the conqueror should be permitted to organize a local government for the conquered territory, including temporary courts for the administration of justice. *Leitensdorfer v. Webb*, 20 How. 176.

13. Where inhabitants of a conquered territory do not remain after surrender of the soil and change of sovereignty, and become citizens under the conqueror, but adhere to their former allegiance, they thereby deprive themselves of protection for their property, except as secured by treaty. *United States v. Repentigny*, 5 Wal. 211.

14. And if the treaty provide that they may sell their property, if to persons of a certain class and within a specified time, property not so sold is to be treated as abandoned to the conqueror. *Ib.*

15. Territory conquered and occupied by an enemy is, for belligerent and commercial purposes, his until restored. *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191.

16. Conquered territory when ceded by treaty becomes a part of the country to which it is annexed, but the law which regulates the intercourse and conduct of individuals remains in force until changed by the power of the state. *American Insurance Co. v. Canter*, 1 Pet. 511.

17. A neutral, domiciled on the beginning of war in one of the belligerent countries, resumes his neutral rights on putting himself *in itinere* to return with his family to his native country to reside; and he may take with him specie for the support of himself and his family. *United States v. Guillem*, 11 How. 47.

18. Such property is not forfeited by a breach of blockade by the vessel in which he has taken passage, he personally being in no fault. *Ib.*

19. A neutral may sell or transport to either belligerent such articles as either may wish to buy, subject to the risk of seizure and condemnation for the carrying of contraband of war or for violation of blockade. *The Bermuda*, 3 Wal. 514.

20. He may lawfully carry goods of any kind, whether contraband or not, from one neutral port to another, if with intent actually to discharge them there, so as to bring them into the common stock of merchandise at that place. *Ib.*

21. But where a voyage from a neutral port with contraband cargo is with intent to go to a belligerent port, neither vessel nor cargo will be

**WAR — continued.**

protected, if otherwise liable, by an intention to touch at an intermediate neutral port; nor by an intention there to transship the cargo, the transportation being deemed continuous so long as the intent remains unchanged, without regard to intervening stoppages or transshipments. *Ib.* See *The Hart*, 3 Wal. 559.

22. The trade of neutrals with belligerents in articles not contraband is free, unless interrupted by blockade. *The Peterhoff*, 5 Wal. 28.

23. If a vessel captured within neutral territory begin the hostilities that result in her capture, she thereby forfeits the neutral protection; and the capture will not be an injury for which redress can be sought from the neutral state. *The Anne*, 3 Wheat. 435.

24. A resident of a loyal state, there arrested by order of the commandant of the military district in which that state is included, on charge of conspiracy against the government, giving aid to rebels, etc., cannot be deemed a prisoner of war, when he is not connected with any military or naval service, and has not resided in the revolted territory. *Ex parte Milligan*, 4 Wal. 2.

*Belligerent Rights — Blockade — What constitutes Blockade — Liability of Vessel.*

See BLOCKADE.

*Belligerent Rights — Of Concession to the Confederacy — Effect.*

See CONFEDERACY, 2.

*Belligerent Rights — Privateering — In general.*

See PRIVATEER.

*Belligerent Rights — Right of Search.*

See RIGHT OF SEARCH.

*Belligerent Rights — Right to capture or confiscate Enemy's Property.*

See CAPTURE; CONFISCATION.

*Belligerent Rights — To restrict Neutral Trade.*

See BLOCKADE; CONTRABAND; RIGHT OF SEARCH.

*Belligerent Rights — To restrict Trade with Enemy.*

See EMBARGO; TRADING WITH ENEMY.

*Capture — In general — What Lawful Prize — Rights and Duties of Captor — Restitution, etc.*

See CAPTURE.

*Civil War — In general.*

See REBELLION.

*Claims — Liability of Government on Claims arising out of the War of the Rebellion.*

See COURT OF CLAIMS — JURISDICTION.

*Contraband — What is — Liability for Conveyance.*

See CONTRABAND.

*Contract of Insurance — Effect of War on — Forfeiture for Non-payment of Premium.*

See INSURANCE — LIFE, 26.



**WAR** — *continued.*

*Contracts Enforcement of which is suspended*  
— *When Accrual of Interest is suspended.*

See **INTEREST**, 3, 4.

*Contracts — War as affecting Legality.*

See **CONTRACT** — **WHAT CONSTITUTES**, 44 *et seq.*

*Courts notice Existence of War.*

See **EVIDENCE** — **JUDICIAL NOTICE**, 12.

*Covering of Belligerent Property by Neutral Papers, according to Law of Nations.*

See **INTERNATIONAL LAW**, 17.

*Embargo and Non-intercourse — In general.*

See **EMBARGO**.

*Guardian — Liability — War does not terminate, but merely suspends, Liability of Guardian an Enemy of the State wherein his Liability was created.*

See **GUARDIAN**, 10.

*Military Offences — Trial.*

See **COURTS-MARTIAL**.

*Partnerships — When War dissolves.*

See **PARTNERSHIP**, 75.

*Power of Government to make War.*

See **UNITED STATES** — **IN GENERAL**, 12.

*Power of Government to make War — Suspension of Statutes of Limitation during Rebellion.*

See **LIMITATION** — **EXCEPTIONS AND INTERRUPTIONS**, 50 *et seq.*

*Prize — In general.*

See **PRIZE**.

*Rebellion — In general.*

See **REBELLION**.

*Revolution — In general.*

See **REVOLUTION**.

*Sale under Power under Deed of Trust — Effect of War on.*

See **MORTGAGE** — **POWER OF SALE**.

*Trading with the Enemy, in general.*

See **TRADING WITH ENEMY**.

*Treaties — War as affecting the continued Existence.*

See **TREATY**, 11, 12.

**WAR DEPARTMENT** — *Powers of Secretary — Contracts — How made.*] Where there is good reason to suspect that a contract for military supplies was made with intent to defraud the government, or in disregard of its rights, the secretary of war may and should suspend payment of the claim arising thereon. *United States v. Adams*, 7 Wal. 463.

2. And he may properly appoint commissioners to hear and determine upon the claim, especially where it arises in a distant district; and the claimant may appear and prosecute his claim before them, or he may carry it before congress or the court of claims, as he may choose. *Id.*

3. The war department by its proper officers

**WAR DEPARTMENT** — *continued.*

may make a valid contract for the slaughtering and packing of hogs, when that is the most expedient mode of securing army supplies of that kind. *United States v. Speed*, 8 Wal. 77.

4. An army regulation forbidding officers and agents in the military service from contracting with other persons in such service in regard to supplies, etc., does not apply to contracts in behalf of the government which require the approval of the secretary of war; the secretary not being in such service in the sense of such a regulation, and the contract of a subordinate officer in such case being in effect that of the secretary. *United States v. Burns*, 12 Wal. 246.

5. The act of June 2, 1862 (12 Sts. 411), which makes it the duty of the secretaries of war, of the navy, and of the interior to require contracts made by them severally on behalf of the United States, or by officers under them; to be reduced to writing and signed by the contracting parties, is mandatory, and in effect prohibits parol contracts and renders them unlawful. [MILLER, FIELD, and HUNT, JJ., dissenting.] *Clark v. United States*, 95 U. S. 539.

6. Where, however, the parol contract has been wholly or partially performed on one side, a recovery may be had on a quantum meruit. *Id.*

*Secretary — Approval of — Necessary to contract for Hospital Stores.*

See **UNITED STATES** — **LIABILITY**, 29.

*Secretary — Direction by, that Land be reserved for Military Purposes, presumed to be directed by President.*

See **EXECUTIVE DEPARTMENTS**, 3.

*Secretary — Functions of, as Organ of Commander-in-chief.*

See **ARMY**, 35.

*Secretary — Supervision of Harbor Improvement — Discretion.*

See **WATERS**, 11.

*Secretary — When not bound by his Covenants on Behalf of United States.*

See **AGENCY**, 28.

**WARD** — *Guardian and Ward — In general.*

See **GUARDIAN**.

**WAREHOUSE BOND** — *Collection of Duties.*

See **DUTIES** — **ASSESSMENT**, 56 *et seq.*

**WAREHOUSEMAN** — *Constitutionality of State Regulations — Warehouseman's Receipt.*] A state statute fixing the maximum of charges for warehousing grain, as, e. g., the Illinois statute of April 25, 1871, passed to give effect to a provision of the state constitution declaring all elevators or storehouses of grain to be public warehouses, and authorizing legislation regulating the same, is not unconstitutional as depriving a person of property without due process of law, whether it allows a reasonable compensation or not; for such

**WAREHOUSEMAN** — *continued.*

warehouses are devoted to a use in which the public has an interest, and where the owner of property devotes it to such a use, he in effect grants to the public an interest in such use, and although he may withdraw the grant by discontinuing the use, so long as he maintains it, he must submit, to the extent of that interest, to public control for the public good. [FIELD and STRONG, JJ., dissenting.] *Munn v. Illinois*, 94 U. S. 113.

2. In Louisiana, the duty of a warehouseman is not to give a receipt unless the property is actually in store, and not to deliver the property afterwards except on the presentation of the receipt. A warehouseman, however, is in no sense a guarantor of the title to the property, nor is he liable if he surrender it on judicial process, and give notice of its surrender. *Mechanics' & Traders' Insurance Co. v. Kiger*, 103 U. S. 352.

3. A warehouseman's receipt for a quantity of wheat, given in consideration of a sum of money, no wheat being delivered, passes no title to any specific wheat, and so will not enable the promisee to maintain replevin against a third person. *Jackson v. Hale*, 14 How. 525.

*Carrier's Liability* — *When not that of Warehouseman.*

See CARRIER — SUCCESSIVE CARRIERS, 10.

*Policy of Insurance on Property "held in Trust" covers the Property and not the Warehouseman's Interest alone.*

See INSURANCE — FIRE, 27.

*Regulation of the warehousing of Grain — Elevators.*

See COMMERCE, 55, 56.

**WARRANT** — *Commitment* — *What sufficient to justify* — *Probable Cause within the Meaning of the Constitution.*

See CRIMINAL PROCEDURE, 3.

*Virginia Military Bounty Lands* — *Location, etc.*

See LANDS OF STATES — VIRGINIA AND KENTUCKY, 6 *et seq.*; LANDS OF UNITED STATES — BOUNTY WARRANTS.

**WARRANTY** — *After-acquired Title inures to Benefit of Covenantee by Way of Estoppel.*

See ESTOPPEL, 18 *et seq.*

*Charter of Vessel* — *Description of Vessel in Charter-party as "now sailed, or about to sail," etc.*

See CHARTER-PARTY, 14.

*Charter of Vessel* — *Warranty of Seaworthiness* — *Implied* — *Express* — *Breach.*

See CHARTER-PARTY, 3 *et seq.*

*Contract of Sale* — *Warranty in general.*

See SALE — WARRANTY.

**WARRANTY** — *continued.*

*Implied* — *Sub-contract for Completion of Work* — *Warranty against Secret Defects in Part done.*

See CONTRACT — CONSTRUCTION, 14.

*Implied Warranty of the Thing sold at Judicial Sale* — *None* — *Officer no Power to warrant expressly.*

See JUDICIAL SALE, 6, 7.

*Insurance Policies* — *What constitutes Warranty, etc.*

See INSURANCE.

*Legislative Grant not a Warranty.*

See LANDS OF STATES — IN GENERAL, 1, 2.

*Married Woman not liable on Covenant of Warranty of Title.*

See HUSBAND AND WIFE, 32.

*Pleading in Covenant* — *Breach of Warranty of Title* — *Declaring as Heirs and devisees* — *Assignment of Breach, etc.*

See COVENANT — ACTION, 5-10.

*Right of Action for Eviction* — *Statute begins to run from Time of Eviction.*

See LIMITATION — STATUTES, 23.

*Special and general* — *Effect* — *Implied Warranty.*

See COVENANT, 2 *et seq.*

**WASHINGTON** — The site of the city of Washington having been conveyed by the proprietors to trustees in trust to convey "for the use of the United States forever" the streets and public squares, an original proprietor has no reversionary interest in the streets and squares, and the government owning them in fee simple, may sell and make title to such portions thereof as are no longer required for public use. *Van Ness v. Washington*, 4 Pet. 232.

2. And the fee in the streets being in the United States, the United States has all the rights of a riparian proprietor, where a street runs along the river, as against the original proprietor to whom, pursuant to another provision of the deed of trust requiring the trustees to reconvey alternate lots, lots fronting on the street have been reconveyed. [WAITE, C. J., and MILLER and GRAY, JJ., dissenting, and holding that while, in general, such would be the rule, yet, as the trust conveyance contemplated an equal division, the riparian rights should be deemed to continue to attach to the lots so reconveyed, notwithstanding the intervention of the street.] *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672.

*Charter* — *Sale of Lottery Tickets* — *Liability to Holder of Tickets, etc.*

See LOTTERY, 1 *et seq.*

*Fee in Land laid out for Alleys.*

See VENDOR AND PURCHASER — IN GENERAL, 18.

**WASHINGTON** — *continued.*

*Matters relating to the District of Columbia.*  
See **DISTRICT OF COLUMBIA**.

*Sale of Lots under Maryland Statutes.*  
See **LANDS OF STATES — MARYLAND**.

*Taxes — Sales of Land for.*  
See **TAX — COLLECTION**, 24 *et seq.*

**WASTE** — *Commission restrained by Injunction.*  
See **INJUNCTION**, 16.

*Tenant may not commit.*  
See **LANDLORD AND TENANT**, 19.

**WATERS** — *Rights of States.*  
See pl. 1-10.

*Right of Federal Government over Improvements.*  
See pl. 11, 12.

*Riparian Owners — Rights in general.*  
See pl. 13-32.

*Riparian Owners — Right to Alluvion — To Accretions.*  
See pl. 33-39.

*Riparian Owner — Right to enjoin Erection of Bridge.*  
See pl. 40.

1. — *Rights of States.*] The grant from Charles II. to the Duke of York of the territory which is now New Jersey, conveyed the soil under the navigable waters as one of the royalties incident to the powers of government, to be held, not as mere private property, but for the benefit of the public in navigation, and in fishing, as well for shell-fish as for floating fish, in the same manner that it had before been held by the crown; and it passed in the same manner under the Duke's grants to the twenty-four proprietors. [THOMPSON, J., dissenting.] *Martin v. Waddell*, 16 Pet. 367; *Russell v. Jersey Co.*, 15 How. 426.

2. When the twenty-four proprietors surrendered the powers of government to the crown, the title to that soil passed in the same manner therewith. [THOMPSON, J., dissenting.] *Martin v. Waddell*, 16 Pet. 367.

3. And at the revolution it passed in the same manner from the crown to the state of New Jersey. *Ib.*

4. At the revolution, the people of the states, in their sovereign character, acquired the absolute right to all navigable waters, and to the soil thereunder. *Russell v. Jersey Co.*, 15 How. 426.

5. The shores of navigable waters and the soil under them were not granted to the United States by the constitution, but were reserved to the states; and new states have the same rights, sovereignty, and jurisdiction over the subject that the original states have. *Pollard v. Hagan*, 3 How. 212; *Pollard v. Kibbe*, 9 How. 471; *Hallett v. Beebe*, 13 How. 25; *Withers v. Buckley*, 20 How. 84.

**WATERS** — *continued.*

6. Whatever soil below low-water mark, with in the ebb and flow of the tide, is the subject of exclusive ownership, belongs to the state within whose territory it lies, if not aliened by the state or its predecessor. *Smith v. Maryland*, 18 How. 71.

7. But it is held subject to, and in some sense in trust for, the enjoyment of certain public rights, among which is the right to take fish, as well shell-fish as floating fish. *Ib.*

8. By the laws of Pennsylvania, the Delaware is a public navigable river held by Pennsylvania and New Jersey in trust for public use; and riparian proprietors have no right to divert the water without a license. *Rundle v. Delaware & Raritan Canal Co.*, 14 How. 80.

9. And such licenses are revocable and subject to the right of the states to divert the water for public improvements, either directly or through corporations created for that purpose. *Ib.*

10. A state statute providing for the improvement of the navigation of a river is not in conflict with a clause in an act admitting the state into the Union which guarantees the free navigation of such river, although it authorizes changes in the channel or course of the river, and so affects the value of private property. *Withers v. Buckley*, 20 How. 84.

11. — *Right of Federal Government over Improvements.*] An appropriation by congress for the improvement of a harbor on a navigable river, "to be expended under the direction of the secretary of war," confers on that officer the discretion to determine the mode of improvement, and authorizes the diversion of water from one channel to another if in his judgment such is the best mode. *South Carolina v. Georgia*, 93 U. S. 4.

12. It cannot be said that by such diversion preference is given to the ports of a state on one side of the river to those of a state on the other. *Ib.*

13. — *Riparian Owners — Rights in general.*] All grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer proprietorship to the middle thread of the stream, and entitle the grantee to accretions as they are formed. *Jones v. Souldard*, 24 How. 41.

14. This applies to great navigable rivers like the Mississippi as well as to others. *Ib.*

15. Thus, the eastern boundary of Missouri and of the city of St. Louis is the middle of the main channel of the Mississippi, and the survey of St. Louis school lands covering Duncan's Island was rightly made, although the island consisted of accretions made after the grant of school lands in 1812 and after the incorporation of St. Louis as a town. *Ib.*

16. Where the survey and plat described land sold by the government as bounded on the south by a river running about due east to a lake, the grantees took only to the boundary

**WATERS — continued.**

therein described, although in fact the channel in which the river then ran was a new and artificial one, and the natural channel, in which the water afterwards occasionally flowed, trended sharply to the southward and entered the lake at a different point. *Bates v. Illinois Central Railroad Co.*, 1 Black, 204.

17. Under the several acts of congress providing for the survey and sale of public land bordering on navigable rivers, which declares such rivers to be public highways, the title of a grantee of such land does not extend to the *medium filum*, but stops at the margin of the stream. *St. Paul & Pacific Railroad Co. v. Schurmeir*, 7 Wal. 272.

18. But the proprietors of such lands have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, that owners of land on navigable waters affected by the ebb and flow of the tide have. *Ib.*

19. Whether on navigable waters above the ebb and flow of the tide the riparian proprietor has a right to the shore and bed of the river, depends on the law of the state where the land is situated. *Barney v. Keokuk*, 94 U. S. 324.

20. So, as to whether his title shall extend to land reclaimed from the bed of the river by artificial means, as well as by accretion. *Ib.*

21. *Semble* that the true rule, however, since all waters in fact navigable have been held navigable in contemplation of law, would hold proprietorship to be, as it is held in Iowa, in the state. *Ib.*

22. A street, passage-way, or other open space, permanently established for public use, between the most eastern lots in the original town of St. Louis and the Mississippi River, prevented the owners of the lots from being riparian owners; but not so of a way kept up at the risk and charge of the owners, where the way and the lot enclosures followed the recessions and encroachments of the river. *St. Louis Schools v. Risley*, 10 Wal. 91.

23. By the law of Massachusetts the littoral proprietor owns to low-water mark, subject to a right in the public to use the space between high and low water mark for purposes of navigation as long as he allows it to remain unoccupied, and subject to restrictions imposed by the state in the exercise of its power to protect public harbors, etc., and prevent encroachments thereon. *Boston v. Lecraw*, 17 How. 426; *Richardson v. Boston*, 24 How. 188.

24. But the use by the public, although lawful, is not adverse, and can lay no foundation for a presumption of dedication. *Ib.*

25. Riparian owners may erect piers and landing-places on the shores of the lakes, as well as of navigable rivers, bays, and arms of the sea, if they conform to state regulations and do not obstruct navigation. *Dutton v. Strong*, 1 Black, 23; *Yates v. Milwaukee*, 10 Wal. 497.

**WATERS — continued.**

26. Such piers, the property of individuals, though they are, in general, for public use, may be held for the exclusive benefit of the proprietors; and if they are confined to unnavigable waters alongshore, a construction for public use is not to be presumed. *Dutton v. Strong*, 1 Black, 23.

27. If a vessel be attached to such a private pier in a violent storm, and it become apparent that the pier is thereby greatly endangered, the owners of the pier may, after due warning, cut the vessel loose, whatever her peril. *Ib.*

28. A statute conferring on a city the power to establish dock and wharf lines, to restrain encroachments and to prevent obstructions to a navigable stream, does not authorize it to declare by special ordinance a private wharf to be an obstruction to navigation and a nuisance, and to order its removal, when in fact it is not an obstruction or a nuisance. *Yates v. Milwaukee*, 10 Wal. 497.

29. A riparian owner on the Mississippi, having no authority other than such as arises from his ownership, has no right to erect a pier in the navigable water of the river, to be used solely as part of a boom for receiving and holding logs to supply a mill; and when a vessel comes into collision therewith, without fault, he is liable for the damage; but if the vessel be in fault, the damages, in the admiralty, may be divided. *Atlee v. Union Packet Co.*, 21 Wal. 339.

30. Under a charter which, like that of 1848, to Keokuk, Iowa, gives the city power to establish landing-places, wharves, etc., along its river front, and to use a particular street running along the shore, of which there has been a common-law dedication, for that purpose, if a riparian proprietor holds the legal title to land reclaimed by the city from the bed of the river along that street, he holds it subject to the right of the public to use it as a street and for the purposes of wharves, landings, and levees; and the city, while it may not permit the erection of a railroad warehouse on the land without compensation to such proprietor, may permit the laying of railroad tracks thereon, such tracks not being necessarily an obstruction to a highway, and the erection thereon of a packet warehouse, such a structure being necessary to navigation and a proper adjunct to a landing-place, and justified by the common law as well as by the charter; and such is the law in Iowa. *Barney v. Keokuk*, 94 U. S. 324.

31. Whether a riparian owner of land on the Mississippi in Iowa has or has not the right under the statute of March 18, 1874, to make an embankment along the river front and erect a pier at the outer end below low-water mark, the erection of piers being regulated by congress, a railroad company seeking to appropriate an embankment must pay therefor, as by the express terms of the Iowa statute, the statute being so far valid, notwithstanding the action of congress;

**WATERS — continued.**

and this, although lands in Iowa between high and low water mark are vested in the state. *Davenport & Northwestern Railway Co. v. Renwick*, 103 U. S. 180.

32. A purchaser of a lot in San Francisco not bordering on the shore of the bay, but lying along and back of the water-front line established by the statute of March 26, 1851, and half a mile inland, holds in subordination to the right of the city under that statute and the statute of May 1, 1851, to control the space in front of that line, and cannot maintain a wharf in the bay by virtue of any claim of riparian proprietorship, as against the right of the city to remove the same in the exercise of her power under the latter statute to authorize improvements in the harbor. *Weber v. Harbor Commissioners*, 18 Wal. 57.

33. — *Riparian Owners — Right to Alluvion — To Accretions.* Alluvion is an addition to riparian land gradually and imperceptibly made, through causes either natural or artificial; and this, whether the stream is one that overflows its banks or not. *St. Clair County v. Livingston*, 23 Wal. 46.

34. The owner of land bounded by a stream owns the alluvial deposit along the shore. *New Orleans v. United States*, 10 Pet. 662.

35. The right to alluvion depending upon contiguity, the accretion made in front of a strip of land bordering on a river belongs to such strip and not to the larger parcel behind, from which the strip was separated on a former sale thereof. *Saulet v. Shepherd*, 4 Wal. 502.

36. Accretions by gradual deposits to land with a water front, made after a platting of the land, will not pass to a purchaser of a lot as appurtenant to the lot as originally laid out, but only under a description which includes them. *Jones v. Johnston*, 18 How. 150.

37. If the deed of a purchaser of such a lot describe the lot by reference to the plat, in which the lot is laid down as bounded on one side by a street and included between two lines at right angles thereto extended to the shore, the claim of the grantee to a water front and its accretions is to be determined by the condition of the water front at the time of conveyance, and not at the time of the platting. *Ib.*

38. In ejectment for land formed by accretion, the question of whether the plaintiff had a water front must be determined by the condition of the lot when the plaintiff took his deed, and not, through the fiction of relation, by its condition when the grantor gave a third person, of whom the plaintiff purchased, the title bond on which the deed was founded. *Johnston v. Jones*, 1 Black, 209.

39. What is the rule for dividing accretions between adjoining riparian proprietors. *Jones v. Johnston*, 18 How. 150; *Johnston v. Jones*, 1 Black, 209; *Banks v. Ogden*, 2 Wal. 57.

40. — *Riparian Owner — Right to enjoin Erection of Bridge.* A riparian owner whose

**WATERS — continued.**

property will be injured thereby may maintain a bill to enjoin the erection of a bridge over a tidal and navigable river, although not immediately interested in its navigation. *Gilman v. Philadelphia*, 3 Wal. 713.

*Common Law as to Riparian Rights to the Use of Running Water inapplicable on Western Mineral Lands — Custom, etc.*

See MINES, 17 *et seq.*

*Power of Congress and of States over.*

See COMMERCE.

*Rights of Riparian Proprietors incident to the Public Right to the Passage of Fish are subject to Legislative Regulation.*

See FISHBERIES, 4.

*Riparian Rights of the United States in City of Washington.*

See WASHINGTON, 2.

**WAY.** — In Massachusetts, when land is taken for a public way, an easement only is acquired; the soil and freehold remain in the private owner. *Harris v. Elliott*, 10 Pet. 25.

2. An owner's right to the soil on a discontinuance of the way, held not barred by the statute of that state of October 30, 1781, passed to protect the doings of commissioners in laying out certain streets in Charlestown. *Ib.*

*Conveyance of Adjoining Land conveys Fee to Middle of Way.*

See DEED — CONSTRUCTION, 13, 14.

*Dedication of Land for Public Way — In general — When presumed.*

See DEDICATION.

*Railroad Tracks in the Streets of a Town.*

See WATERS, 30.

*Right of Way over Public Lands — Grant thereof.*

See LANDS OF UNITED STATES — LEGISLATIVE GRANTS, 28 *et seq.*

*Soil of Way does not pass under Term "Appurtenances."*

See DEED — CONSTRUCTION, 27.

*Travellers thereon — Crossings of Railroads.*

See RAILROAD — COMPANY, 5 *et seq.*

**WEST VIRGINIA** — *Separation between, and Virginia.*

See STATES — COMPACTS, 7.

**WHARFAGE** — *Charges therefor — Distinguished from Tonnage Duties.*

See TONNAGE DUTY.

**WHOLESALE DEALER** — *Meaning of the Term.*

See INTERNAL REVENUE — ASSESSMENT AND COLLECTION, 4.

**WIDOW** — *Dower — Right to.*

See DOWER.

**WIFE** — *In general — Rights, Powers, etc.*  
See **HUSBAND AND WIFE**.

**WILL** — *What is devisable.*

See pl. 1-3.

*Execution and Attestation.*

See pl. 4, 5.

*Revocation.*

See pl. 6-13.

*Probate — How made — Necessity for — Effect of — Revocation of Probate, how effected.*

See pl. 14-35.

1. — *What is devisable.*] In New York, a right of entry is devisable as being an estate of inheritance within the statute of wills. *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99.

2. In New York, the power to devise is not abated by adverse possession of one who holds under a sheriff's sale of the land, as the property of one who has no title. *Waring v. Jackson*, 1 Pet. 570.

3. Under the Louisiana Code of 1808, the owner of property could not dispose of more than one fifth thereof by will, if he had a legitimate child. The child was the forced heir of the residue. *Patterson v. Gaines*, 6 How. 550.

4. — *Execution and Attestation.*] A will, to pass title to land in the District of Columbia, must be executed in conformity to the laws then in force. It will not suffice that it is, and is to be, received as so executed and probated as to pass the title to real estate in Virginia. *Robertson v. Pickrell*, 109 U. S. 608.

5. Under the Spanish law in force in California before the formation of the state government, a will was not void merely because it did not appear on the face thereof that the witnesses were present throughout its execution, and heard and understood its contents. *Adams v. Norris*, 23 How. 353.

6. — *Revocation.*] Under the law of France, in 1816, a will could be revoked by an act before a notary declaring such intention, or by a subsequent will. *Ennis v. Smith*, 14 How. 400.

7. By the law of Louisiana, the deed of a devisee under a will revoked by a subsequent will, conveys no title as against the devisee under the second will. *Gaines v. New Orleans*, 6 Wal. 642.

8. The probate of a will of later date necessarily annuls a prior will, so far as the provisions of the two are inconsistent, and so far as the estate has not been legally administered under the prior one. *Ib.*

9. A devisee, to set up a claim under a will duly proved, need not procure the probate of an earlier will to be formally set aside, the probate of the second will rendering the former one inoperative; and it makes no difference that there has been a partial administration under the first one. *Gaines v. Hennen*, 24 How. 553.

10. If one purchase from an executor, having

**WILL** — *continued.*

reason to believe in the existence of a later will, with different executors and making different disposition of the property, he will be liable to parties entitled under such will, notwithstanding the sale was made by order of court. *Gaines v. De la Croix*, 6 Wal. 719.

11. The later will, when found, relates back as against such a purchaser, and affects him with notice of its existence and contents as of the time when he purchased. *Ib.*

12. If a testator enter into a contract to lease land which he has specifically devised, reserving a perpetual ground rent, with a right to the lessee to extinguish it by paying a fixed sum, he thereby effects such a change of interest as to revoke the devise. *Bosley v. Bosley*, 14 How. 390.

13. Where a will has been admitted to probate, a revocation thereof by a subsequent will cannot be set up effectually for the making of title under the latter, except in a court of probate, although perhaps in some circumstances equity might compel a party to allow the revocation of the probate and the substitution of the subsequent will by that court. *Gaines v. Chew*, 2 How. 619.

14. — *Probate — How made — Necessity for — Effect of — Revocation of Probate, how effected.*] Section 9 of the North Carolina statute of 1715, concerning the proving of wills, etc., was repealed by the statute of 1789; and the declaration to the contrary in the statute of 1799 is inoperative as to an action brought before the passage of the last-named act. *Ogden v. Blackledge*, 2 Cranch, 272.

15. In Kentucky, although under the statute a will must be subscribed by two witnesses, the testimony of one may prove it. *Davis v. Mason*, 1 Pet. 503.

16. In Louisiana, secondary evidence is admissible to prove the contents of a lost will, and to carry it into probate. *Gaines v. Hennen*, 24 How. 553.

17. The probate court of the place of domicile properly has jurisdiction to take probate of the will of a deceased patentee, and issue letters testamentary. *Providence Rubber Co. v. Goodyear*, 9 Wal. 788.

18. Title to land by devise can be acquired only under a will proved and recorded according to the laws of the state in which the land lies. Probate, therefore, in one state is inoperative upon the title to land in another. *McCormick v. Sullivant*, 10 Wheat. 192; *Darby v. Mayer*, Id. 465; *Robertson v. Pickrell*, 109 U. S. 608.

19. To give validity and effect to a will made in another state, under a state statute permitting such wills to be proved and recorded in the county where the land is situate, it must be made to appear that the requirements of the statute have been pursued. *Kerr v. Moon*, 9 Wheat. 565.

20. A testamentary paper executed in a foreign country, although valid as a will under the law of that country, cannot be made the foundation of a suit for a legacy, in the courts of this

**WILL — continued.**

country, until it has been admitted to probate here. *Armstrong v. Lear*, 12 Wheat. 169.

21. A will which was never proved nor admitted to record, under which nothing was done for many years, and the execution of which is not proved to the court, cannot be received in evidence to defeat a title under the heirs of the supposed testator. *Meegan v. Boyle*, 19 How. 130.

22. Under the law of California, a will made prior to the formation of the state government, and while the Spanish law was in force, is not inadmissible in evidence because it has not been admitted to probate and established as an authentic act by the examination of the witnesses. *Adams v. Norris*, 23 How. 353.

23. An attempted disposition of property, void as a gift *causa mortis*, cannot be sustained as a will before probate and the appointment of an executor, in a state where, as in Tennessee, a will of personality does not take effect until then. *Basket v. Hassell*, 108 U. S. 267.

24. The probate of a will, held not evidence on the question *devisavit vel non*, under the laws either of Maryland or Tennessee. *Darby v. Mayer*, 10 Wheat. 465.

25. No question under the constitution as to the credit to be given to the records, etc., of a state, can arise on the admission in evidence in one state of the probate of a will in another state under the law of which such probate is not evidence on the question *devisavit vel non*. *Id.*

26. The regular probate of a will in a state court of competent jurisdiction is conclusive of its validity and contents in the supreme court. *Gaines v. New Orleans*, 6 Wal. 642.

27. In Louisiana, the probate of a will devising land may be collaterally drawn in question in a suit by an heir-at-law to try the title thereto; and if the parties be numerous, and the controversy complicated, and discovery be wanted and can be had, equity will give relief, especially in a case of fraud. *Gaines v. Chew*, 2 How. 619.

28. Where a will was admitted to probate in New Orleans, in 1792, by the alcalde, the only tribunal in the province then having jurisdiction, and the property was distributed and held under it without dispute for more than fifty years, it was held conclusive, in the absence of proof of fraud, both as to the validity of the probate in law, and its fairness on the facts. *Fouvergne v. New Orleans*, 18 How. 470.

29. In Illinois, a copy of a will proved in another state, if duly certified, may be recorded in the county court of a county in which the testator may have had property; and a copy of such record is evidence. *Secrist v. Green*, 3 Wal. 744.

30. The title of a *bona fide* purchaser from a devisee in a will admitted to probate on the ground of a probate in the state of the testator's domicile, is not affected by a subsequent reversal of the original probate in appellate proceedings collusive between the devisee and the heirs-at-law

**WILL — continued.**

and fraudulent as against the purchaser, although supported by *ex parte* proceedings setting aside the ancillary probate. *Foulke v. Zimmerman*, 14 Wal. 113.

31. Where the state law provided for an appeal from the probate of a will, held that errors in probate should be so corrected, and that an original bill in the circuit court alleging the probate to be void would not lie. *Tarver v. Tarver*, 9 Pet. 174; *Fouvergne v. New Orleans*, 18 How. 470.

32. A court of equity will not entertain jurisdiction of a suit to set aside the probate of a forged will, where the powers of the probate court in the premises were sufficient to afford the necessary relief. *In re Broderick's Will*, 21 Wal. 503. And see *Ellis v. Davis*, 109 U. S. 485.

33. And it will make no difference that the fraud and forgery were not known to the complainants until after the expiration of the time within which they might have applied for relief in the probate court, their only excuse for delay and want of knowledge being that, living in a secluded and distant part of the world, notice of the testator's death, of the probate proceedings, and of current rumors of the fraud and forgery, failed to reach them. [*CLIFFORD and DAVIS, JJ., dissenting.*] *In re Broderick's Will*, 21 Wal. 503.

34. Where, as in Ohio, the statute provides for setting aside the probate of a will by a suit in equity brought within two years, and declares that the verdict shall be final between the parties, a decree made in a suit in which, although the estate is devised to executors in trust, neither executors nor an administrator are made parties, except an executor who resigns pending the suit and before answer filed, the other executors having resigned before, does not bind after-born grandchildren of the testator who, under the terms of the will, acquire vested estates in remainder when they are born, the interests of infant grandchildren of the same class living at the time of the suit being represented by guardians *ad litem* who were either parents and heirs-at-law or husbands of parents of such grandchildren and interested to defeat the will. [*WAITE, C. J., and HARLAN, J., dissenting.*] *McArthur v. Scott*, 113 U. S. 340.

35. Where a decree setting aside the probate of a will is rendered in a suit wherein unborn remainder-men are not represented, their rights in the land devised are not affected by a partition and a subsequent sale to third persons for a valuable consideration. *McArthur v. Scott*, 113 U. S. 340.

**Construction — By what Law governed.**

See CONFLICT OF LAWS, 15, 16, 20.

**Construction — Decision of State Court construing Will of Land — When followed by Federal Courts.**

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 137.

**WILL — continued.***Devise and Legacy — In general.*

See DEVISE AND LEGACY.

*Devise to Charity — In general.*

See CHARITY.

*Effect under Statute of Uses — Decision of State Court followed by Federal Courts.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 82.

*Evidence — Admissible, although Will not registered before Suit brought.*

See EVIDENCE — DOCUMENTARY, 26.

*Evidence — Extrinsic, to aid in Construction.*

See EVIDENCE — EXTRINSIC OR PAROL, 50-54.

*Execution of, Custom in California before its Annexation.*

See CUSTOM AND USAGE, 5.

*Powers in Wills — In general.*

See POWERS.

*Probate — Revocation — Dismissal of Petition to revoke — When final for Purposes of Appeal.*

See APPEAL AND ERROR — JURISDICTION, 172.

*Suit to annul — When removable from State Court — Parties.*

See REMOVAL OF CAUSES, 24, 69.

*Trust under Will.*

See TRUST.

**WITHDRAWAL — Appearance — Effect.**

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 49.

*Transcript of Record filed on Appeal.*

See APPEAL AND ERROR — PROCEEDINGS ABOVE, 12.

**WITNESS — Competency — In general.**

See WITNESS — COMPETENCY.

*Credibility — In general.*

See WITNESS — CREDIBILITY.

*Examination — In general.*

See WITNESS — EXAMINATION.

*Impeaching and corroborating — In general.*

See WITNESS — IMPEACHING AND CORROBORATING.

*Miscellaneous Matters.*

See WITNESS — IN GENERAL.

**WITNESS — COMPETENCY — Competency in general — Insanity — Testimony of Jurors as to Grounds of Verdict.**

See pl. 1-3.

*Competency as affected by Interest — Testimony of Parties in their own Behalf — Under the Act of 1864.*

See pl. 4-31.

**WITNESS — COMPETENCY — continued.***Competency of Wife — Under the Act of 1864.*

See pl. 32-35.

**1. — Competency in general — Insanity — Testimony of Jurors as to Grounds of Verdict.]**It is no objection to the competency or credibility of a witness, sane when examined, that he is subject to fits of derangement. *Evans v. Hetlich*, 7 Wheat. 453.**2. A person affected with insanity is admissible as a witness, if it appear to the court, on examining him and competent witnesses, that he has sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of what he has seen and heard bearing on the questions at issue. *District of Columbia v. Armes*, 107 U. S. 519.****3. The extent to which jurors may be heard to testify as to the grounds of their verdict, where the question of what was decided arises in another proceeding, discussed. *Washington, Alexandria, & Georgetown Steam Packet Co. v. Sickles*, 5 Wal. 580.****4. — Competency as affected by Interest.]**In a proceeding to enforce a forfeiture, the person who acted as agent of the government in making the seizure is a competent witness *ex necessitate*; and, besides, his interest in obtaining a certificate of probable cause is too remote to disqualify him, especially where he acted under a search warrant. *Taylor v. United States*, 3 How. 197.**5. A notary is a competent witness to prove his own acts in presenting a note for payment, etc., although liable to the plaintiff for negligence therein. *Cookendorfer v. Preston*, 4 How. 317.****6. A naked trustee, having no interest in the trust fund, is a competent witness in a suit concerning the fund. *Patton v. Taylor*, 7 How. 132.****7. A consignee out of whom title has passed is competent as against an attaching creditor to prove title in the consignee. *Grove v. Brien*, 8 How. 429.****8. In an action for the infringement of a patent, one who has used the thing patented is a competent witness for the defendant, although by the specification of defence matters are put in issue which, if found for the defendant, would justify a decree avoiding the patent. *Evans v. Eaton*, 7 Wheat. 356.****9. The owner of stolen goods is a competent witness for the prosecution, on an indictment under the act of April 30, 1790, § 16 (1 Sts. 116), for the punishment of larceny on the high seas, etc., although the statute gives to the owner half of the fine imposed on conviction. *United States v. Murphy*, 16 Pet. 203.****10. The grantor of a rent charge, who has divested himself of all interest in the land, who is released from liability to costs, and is not a party of record, is a competent witness to prove usury in the contract. *Scott v. Lloyd*, 19 Pet. 145.**



**WITNESS — COMPETENCY — continued.**

11. A., sole owner of a bill of exchange, indorsed it in blank and delivered it to B. to deliver to C. for collection, with instructions to place the proceeds to the credit of A. and B. C. collected, but refused to credit as directed, and A. and B. settled their account with him without the credit. In an action by A. against C. for the proceeds of the bill, it was held that B. was a competent witness for A. *Taber v. Perrott*, 9 Cranch, 39.

12. The principal obligor is not a competent witness for the surety, in an action on the bond, being liable to the surety for the costs if the judgment should go against him. *Riddle v. Moss*, 7 Cranch, 206.

13. The assignee of a pre-emption warrant is not incompetent by reason of interest to prove facts which do not tend to support the title of the party producing him. *Wilson v. Speed*, 3 Cranch, 283.

14. The owner of property which is about to become the object of a suit may lawfully transfer it in order to make himself competent as a witness; and his testimony, while subject to scrutiny, is governed by the ordinary rules of evidence. *Tobey v. Leonard*, 2 Wal. 423.

15. It is no objection to the competency of a witness for the government in the court of claims that his interest is adverse to that of the claimants, and that a judgment against them may have the effect of establishing his right to the money claimed. *Bradley v. United States*, 104 U. S. 442.

16. — *Testimony of Parties in their own Behalf — Under the Act of 1864.* A party of record is not a competent witness. *Smyth v. Strader*, 4 How. 404.

17. Not even if divested of all interest. *Bridges v. Armour*, 5 How. 91.

18. A curator, party to the record, is not a competent witness, even if his liability for costs be removed by a release. *Stein v. Bowman*, 13 Pet. 209.

19. The rule excluding the testimony of a party does not extend to an affidavit of the loss of a paper the contents of which are sought to be proved by parol. *Taylor v. Riggs*, 1 Pet. 591.

20. If in a joint action on a bond against the principal and his sureties the defendants sever in their pleas, and the plaintiff take judgment by default against the principal, the principal ceases to be a party of record, and, being released by his sureties, is a competent witness for them. *United States v. Leffler*, 11 Pet. 86.

21. A defendant in assumpsit as to whom the action has abated by reason of want of service of the writ is a competent witness for his co-defendant, if released by him. *Le Roy v. Johnson*, 2 Pet. 186.

22. A discharge in bankruptcy of a party plaintiff does not remove the objection to his competency as a witness on the score of interest, as he still remains interested to avoid a liability

**WITNESS — COMPETENCY — continued.**

for costs, from which his certificate would not release him, and also to increase the fund in the hands of the assignee. *Bridges v. Armour*, 5 How. 91.

23. A discharge will not render his testimony admissible against his co-debtor in a suit against them to recover a debt contracted in a foreign country before the discharge. *Clark v. Van Riemsdyk*, 9 Cranch, 153.

24. It is no objection to the competency of a witness for the defence in an action for infringement of a patent, that he is defendant in another action for infringement of the same patent. *Evans v. Hettich*, 7 Wheat. 453.

25. The act of July 2, 1864 (13 Sts. 351), making parties and interested persons competent witnesses, and the act of March 3, 1865 (13 Sts. 533), creating certain exceptions to the rule, apply to civil actions to which the government is a party, although the government is not expressly named. *Green v. United States*, 9 Wal. 655.

26. The proviso to section 3 of the act of 1864, that in the courts of the United States no witness shall be excluded in any civil action because of interest, does not apply to territorial courts, such courts not being courts of the United States. *Good v. Martin*, 95 U. S. 90.

27. Under those acts, as re-enacted in Rev. Sts. § 858, a party may compel his adversary to testify, parties being put thereby on the level of other witnesses. *Texas v. Chiles*, 21 Wal. 488.

28. Under that section, parties being competent, the deposition of a party may be used. *New Jersey Railroad Co. v. Pollard*, 23 Wal. 341.

29. The clause of section 858, which provides that, unless called by the opposite party, neither party, in actions by or against administrators, etc., shall be allowed to testify against the other as to transactions with the intestate, applies only where the witness is a party, not where he is merely interested; and a witness in a circuit court, competent under this construction, is not incompetent because he would be so under the state statute. *Potter v. Chicago Third National Bank*, 102 U. S. 163.

30. That section applies to the courts of the District of Columbia as fully as to the circuit and district courts. [BRADLEY, J., dissenting.] *Page v. Burnstine*, 102 U. S. 664.

31. Where A. recovers judgment against B., levies on stock claimed by C. under an assignment from B., and summons C. as garnishee, and pending such proceedings B. dies and his administrator comes in to defend, both C. and the administrator are competent to testify of their own motion in regard to what took place at the time of the assignment notwithstanding the provisions of that section. *Monongahela National Bank v. Jacobus*, 109 U. S. 275.

32. — *Competency of Wife — Under the Act of 1864.* A wife cannot be permitted to testify that her husband confessed to her that he

**WITNESS — COMPETENCY — continued.**

had committed perjury in a deposition read in the cause, although the husband be dead. *Stein v. Bowman*, 13 Pet. 209.

33. On an indictment for bigamy, so long as the fact of the first marriage is contested, the second wife is an incompetent witness. *Miles v. United States*, 103 U. S. 304.

34. Where state statutes declare (as do those of Wisconsin) that a married woman may be a witness in her own behalf in an action for damages for a personal injury to herself, and that a party to a civil action "may be examined as a witness in his own behalf, or in behalf of any other party," the right of a married woman to testify is not impaired by the fact that the damages in such a suit brought by her husband and herself may belong to her husband when recovered. *Union Packet Co. v. Clough*, 20 Wal. 528.

35. The act of 1864, which says that parties to civil actions and those interested in the issues shall not be excluded from testifying, does not affect the incompetency of a wife to testify in her husband's favor, especially in a state where such testimony would be incompetent. *Lucas v. Brooks*, 18 Wal. 436.

*Competency of Claimant or of his Assignor in Court of Claims.*

See COURT OF CLAIMS — PRACTICE, 5, 6.

*Parties to Negotiable Instruments — When incompetent.*

See BILLS AND NOTES — IN GENERAL, 8-12.

*Party to Instrument incompetent to impeach it only where the Instrument is negotiable.*

See ESTOPPEL, 9.

*State Laws touching Competency not Rules of Decision.*

See FEDERAL COURTS — STATE LAWS, RULES OF DECISION, 115.

**WITNESS — CREDIBILITY —** *Testifying to an Affirmative — Falsus in uno, etc.*] In general, a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative, because while one may have forgotten what actually occurred, one cannot remember what never did occur. *Stitt v. Huidekoper*, 17 Wal. 384.

2. An immaterial contradiction of his testimony may leave a witness credible; but if he be shown to have wilfully departed from the truth, the maxim *falsus in uno, etc.*, must be applied. *The Santissima Trinidad*, 7 Wheat. 283.

**WITNESS — EXAMINATION —** *Examination — Cross-examination — Refreshing Recollection.*] A witness may not be asked what he understood from one whose statements to the witness may be of importance on the question of knowledge of a certain matter on the part of him who made the statements. *Connecticut Mutual Life Insurance Co. v. Union Trust Co.*, 112 U. S. 250.

**WITNESS — EXAMINATION — continued.**

2. Testimony on a question of limitation and possession that a party and his tenants "had continued possession," was excluded as testimony to a matter of mixed law and fact, the witness having already testified particularly as to all the facts of possession. *Cook v. Burnley*, 11 Wal. 659.

3. To permit a question which may elicit improper testimony is not of itself erroneous, as the answer may be that the witness knows nothing of the matter, or may be favorable to the objecting party, and so work him no injury. *Nailor v. Williams*, 8 Wal. 107; *Lovell v. Davis*, 101 U. S. 541.

4. The right to cross-examine is limited to matters covered by the direct examination. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Pet. 448; *Houghton v. Jones*, 1 Wal. 702.

5. The limit to which a cross-examination may be carried for purposes apart from the immediate merits of the case is a matter of discretion with the presiding judge. *Johnston v. Jones*, 1 Black, 209; *Klein v. Russell*, 19 Wal. 433.

6. The court may refuse permission to ask a witness questions on cross-examination put merely to ascertain the names of persons who might, if called, disprove the case of the party calling the witness. *Storm v. United States*, 94 U. S. 76.

7. Questions propounded to a witness on cross-examination for the purpose of affecting his credibility can be asked only if the court, in its discretion, deem proper. *Id.*

8. On the issue of whether the plaintiff in a suit for damages for injuries resulting from the upsetting of a stage-coach in which he was riding was a trespasser, he having testified in his own behalf that he was granted leave to ride free, he may properly be asked on cross-examination whether fare was not demanded of him. *Gilmer v. Higley*, 110 U. S. 47.

9. A cross-examination in a case of collision, extending to upwards of four hundred interrogatories, characterized as in excess of the right. *The Ottawa*, 3 Wal. 268.

10. Although greater latitude may be allowable in the cross-examination of a party who testifies in his own behalf than in that of other witnesses, if it be directed to matters not inquired about in the principal examination, its course and extent are largely subject to the control of the court in the exercise of a sound discretion, the exercise of which is not revisable on error. *Rea v. Missouri*, 17 Wal. 533.

11. A witness may be asked to state the contents of a paper in order to test his temper and credibility, where the matter is incidental and collateral, and does not affect the merits, although he has not been notified to produce it. *Klein v. Russell*, 19 Wal. 433.

12. A witness offered to prove the testimony given at a former trial by a witness since deceased may refer to notes which he took at the

**WITNESS — EXAMINATION — continued.**

trial in order to refresh his memory. *Ruch v. Rock Island*, 97 U. S. 693.

13. A memorandum made nearly two years after the transaction to which it purports to refer is inadmissible to refresh the memory, especially where the witness has no recollection of the facts stated in the memorandum, but is willing to testify to their truth only because of his confidence that he must have known them to be true when he signed the memorandum. *Mazwell v. Wilkinson*, 113 U. S. 656.

*Cross-examination must be included in Bill of Exceptions, when.*

See EXCEPTIONS, 56.

*Cross-examination on taking of Deposition Waiver of Objection to Time of taking.*

See DEPOSITION, 38.

*Equity — Circuit Court need not permit Examination in Open Court.*

See CIRCUIT COURT — PRACTICE, 7.

*Examination, when, in Support of Answer setting up New Matter.*

See PLEADING UNDER CODES, 7.

*Not bound to criminate himself.*

See DISCOVERY, 3.

*Prize Court — Examination in.*

See PRIZE — PRACTICE, 44.

*Taking of Testimony under a Commission and de bene esse.*

See DEPOSITION.

**WITNESS — IMPEACHING AND CORROBORATING — In general — Evidence of Character and Reputation — Of Different Statements.]**

Testimony as to the admissions and conduct of a person cannot be impeached by evidence of the statements of such person to a third party, concerning the character of the witness giving the testimony. *Maryland v. Baldwin*, 112 U. S. 490.

2. Where, on cross-examination, counsel asks a question, and, on its being objected to, disclaims an intention of impeaching the witness, his disclaimer must be deemed to extend to all modes of impeachment. *Standard Oil Co. v. Van Etten*, 107 U. S. 325.

3. Where a witness is introduced to impeach another for want of veracity, the proper form of the inquiry is as to the general reputation for truth of the witness sought to be impeached. *Knode v. Williamson*, 17 Wal. 586.

4. The general question, what is the reputation of the witness for moral character, is inadmissible. *Teese v. Huntingdon*, 23 How. 2.

5. It is within the discretion of the court to refuse to allow a witness called to impeach another to testify as to his reputation for truth and veracity five years before, where he has already said that he knew nothing of his character since that time. *Ib.*

6. Evidence of contradictory statements by a witness is not admissible to impeach him, unless

**WITNESS — IMPEACHING AND CORROBORATING — continued.**

he has been asked whether he made them. *Conrad v. Griffey*, 16 How. 38.

7. And it makes no difference that the witness testifies by deposition while the contradiction is by a letter. *Ib.*

8. In general, when evidence of declarations of a witness has been given to impeach his testimony, other declarations made at different times cannot be proved to corroborate him. *Ellicott v. Pearl*, 10 Pet. 412; *Conrad v. Griffey*, 11 How. 480.

9. A party cannot be permitted to discredit a witness whom he has called and examined, by proving his former declarations, although the adverse party have also examined him in chief. *Ellicott v. Pearl*, 10 Pet. 412.

**WITNESS — IN GENERAL — Fees in Washington and Alexandria.**

See DISTRICT OF COLUMBIA, 11-13.

*Illness of Witness — No Ground for enjoining Judgment.*

See INJUNCTION, 37.

*Not a "Person affected" within the Meaning of the Civil Rights Act of 1866.*

See CIVIL RIGHTS, 33.

*Privileged Communications.*

See ATTORNEY, 42-44.

*Testimony in Further Proof in Admiralty — Examination out of Court — On Appeal.*

See ADMIRALTY — PRACTICE, 85, 88.

**WITNESSING — Deed — Witnessing — Number of Witnesses.**

See DEED — PROOF; DEED — REQUISITES, 7, 8.

*Will — How witnessed.*

See WILL, 5, 14 et seq.

**WORD — Meaning by Custom of Merchants — For the Jury.**

See JURY, 39.

**WORK — Action for Work and Labor.**

See ASSUMPSIT.

**WRIT AND PROCESS — Service — In general — In Suits against Corporations.**

See pl. 1-7.

*Substituted Service.*

See pl. 8-15.

*Officer's Return — Sufficiency and Effect.*

See pl. 16-19.

*Court may permit Copy of Lost Writ to be filed — May permit Amendment nunc pro tunc, showing Service.*

See pl. 20-22.

1. — Service — In general — In Suits against Corporations.] Service of process or

**WRIT AND PROCESS — continued.**

publication of notice, according to statute, is necessary to give jurisdiction of the rights of the party, and a decree without such service or its equivalent is void. *Hollingsworth v. Barbour*, 4 Pet. 466.

2. A statute which, in ejectment, where the premises are occupied, requires service of the declaration by delivery of a copy to the defendant, or, if he be absent, by the leaving of a copy "at the dwelling-house" with some white person of the family of the age of ten years or upwards, is not satisfied by the leaving of a copy with such a person when he is at a distance of a hundred and twenty-five feet from the house in a corner of the house yard. *Kibbe v. Benson*, 17 Wal. 624.

3. A judgment in ejectment obtained by default on a service, defective by reason of a delivery of a copy of the declaration to a member of the defendant's family in a corner of the house yard, and a hundred and twenty-five feet from the house, instead of at the house as required by statute, set aside on a bill in equity, averring a good title and want of actual notice. *Ib.*

4. Where the statute of a state provided that, in the absence of a party and all the members of his family, notice of a suit might be posted on the front door of his "usual place of abode," it was held that a notice posted on a house seven months after they had vacated it, and while they were residing within the confederate lines, was not posted in conformity with the statute, and that a judgment founded on such notice was void. *Earle v. McVeigh*, 91 U. S. 503.

5. Where the charter of a corporation provides that process may be served on any director, service will be deemed sufficient where the return of the officer is of service on one "reputed to be one of the directors," and the record shows that the person named in fact was a director two years before the date of service, and there is no proof that he is not still. *Washington, Alexandria, & Georgetown Railroad Co. v. Brown*, 17 Wal. 445.

6. A state statute which, like that of Michigan, provides for service in suits by attachment against foreign corporations, of a copy of the writ, etc., on any agent, etc., of the corporation within the state, applies only to corporations doing business in the state, and authorizes service only on agents appointed to act there. *St. Clair v. Cox*, 106 U. S. 350.

7. It follows, that, to make a *prima facie* case of jurisdiction to render judgment in such case, the return of the officer showing service on an agent, the record should in some way show that the corporation was doing business in the state. *Ib.*

8. — *Substituted Service.* Except in cases affecting the personal status of the plaintiff, and cases wherein that mode of service may be deemed to have been assented to in advance, the substituted service by publication allowed by statute

**WRIT AND PROCESS — continued.**

where actions are brought against non-residents, is effectual only where, in connection with process against the person for beginning the action, property within the state is brought under control of the court and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property, or affecting some interest therein, — where, i. e., the action is in the nature of a proceeding *in rem*. [HUNT, J., dissenting.] *Pennoyer v. Neff*, 95 U. S. 714; *Harkness v. Hyde*, 98 U. S. 476.

9. A personal judgment, therefore, is without validity, if rendered by a state court in an action on a money demand against a non-resident served only by a publication of summons, and not appearing; and no title to property passes by a sale under an execution issued on such a judgment. [HUNT, J., dissenting.] *Ib.*

10. The rule which requires personal service or a voluntary appearance in such cases applies equally where the defendant is a foreign corporation. *St. Clair v. Cox*, 106 U. S. 350.

11. Where constructive service of process by publication is by statute substituted in place of personal service, and the court, on such service, is authorized to proceed against the person of an absent defendant who is not a citizen of the state nor found within it, the statute must be strictly pursued. *Galpin v. Page*, 18 Wal. 350; *Settlemyer v. Sullivan*, 97 U. S. 444.

12. Eight weeks' publication of notice to an absent defendant will not satisfy a law requiring publication for two calendar months, and a decree thereon will not affect the title of such defendant. *Hunt v. Wickliffe*, 2 Pet. 201.

13. Where a bill is really an original bill, the case is not a proper one for substituted service, although the bill is filed as a cross-bill. *Providence Rubber Co. v. Goodyear*, 9 Wal. 807.

14. The provisions of the act of June 1, 1872, § 13 (17 Sts. 198), regulating the notification of absent defendants in equity suits in the federal courts, apply to a suit pending when the act was passed. *McBurney v. Carson*, 99 U. S. 567.

15. Where a statute directs that proof of publication in a newspaper of substituted service shall be "the affidavit of the printer, or his foreman, or his principal clerk," the affidavit may be made by the editor. *Pennoyer v. Neff*, 95 U. S. 714.

16. — *Officer's Return — Sufficiency and Effect.* A return to a summons that the sheriff has served the defendant personally therewith is sufficient, without a statement that the service was made in the sheriff's county; this will be presumed. *Knowles v. Logansport Gas-Light & Coke Co.*, 19 Wal. 58.

17. Where a sheriff's return on an execution is not authenticated by his signature, it may be shown that no actual seizure was made, such as the law requires. *Watson v. Bondurant*, 21 Wal. 123.

**WRIT AND PROCESS — continued.**

18. Return by the marshal of the death of a party to an execution does not make the fact of his death matter of record. *Walden v. Craig*, 14 Pet. 147.

19. The return of a marshal on a treasury distress-warrant that he has levied on land is *prima facie* evidence that there was no personal property on which a levy could have been made. *Murray v. Hoboken Land & Improvement Co.*, 18 How. 272.

20. — Court may permit Copy of Lost Writ to be filed — May permit Amendment *nunc pro tunc* showing Service.] Where the original writ is lost after it has served to bring the defendant into court, the court may in its discretion permit a copy to be filed. *York & Cumberland Railroad Co. v. Myers*, 18 How. 246.

21. An entry on the record, of the issue of proper process, where inadvertently omitted, may be allowed *nunc pro tunc*, as matter of common practice. *Poweshiek County Supervisors v. Durant*, 9 Wal. 736.

22. An amendment of the marshal's return, *e. g.*, so that it may show that the writ was exhibited, may be made in like manner. *Ib.*

*Admiralty Practice respecting Process.*

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*Defect of Process — Ground for Dismissal of Writ of Error.*

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*Federal Courts — Effect of Process out of, to be decided by Federal Court.*

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*Service — Acceptance of, when equivalent to Appearance.*

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*Service — Illegality of — Objection, when waived — Appearance — Pleading to Merits.*

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*Service in Debt on Collector's Bond — When made.*

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*State Court — In general.*

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**WRIT OF RIGHT**—*Joinder—Pleading—Evidence—Judgment.*] Several tenants claiming distinct parcels by different titles cannot be joined in a writ of right. *Green v. Liler*, 8 Cranch, 229; *Liler v. Green*, 2 Wheat. 306.

2. If, however, they are so joined, it is matter of abatement only that they hold severally; and if they plead in bar, they admit their joint seisin. *Liler v. Green*, 2 Wheat. 306.

3. Joining the *mise* in a writ of right is an admission that the defendants are jointly tenants of the whole freehold. *Green v. Liler*, 8 Cranch, 229.

4. By the Virginia statute of 1786, reforming proceedings on writs of right, the tenant was not precluded from pleading in abatement as at common law, nor from pleading specially in bar. *Ib.*

5. The Kentucky statute requiring that when several tenements are demanded in a writ of right, the contents, situation, and boundaries of each shall be stated, did not change the common-law rule as to the joinder of parties defendant. *Liler v. Green*, 2 Wheat. 306.

6. At common law, a writ of right will not lie except against the tenant of the freehold demanded. *Green v. Liler*, 8 Cranch, 229.

7. A seisin in deed, in contradistinction to a seisin in law, is necessary to maintain a writ of right; but such a seisin may exist, in intentment of law, without an actual entry or a taking of esplees. *Ib.*

8. Under the statute of uses, an entry is not necessary to complete title. *Ib.*

9. A writ of right brings into controversy the rights of the parties only. *Ib.*; *Green v. Watkins*, 7 Wheat. 27. To such writ a better outstanding title in a third person is no defence. *Green v. Liler*, 8 Cranch, 229.

10. The tenant in a writ of right cannot introduce evidence of a title in a third person with

**WRIT OF RIGHT**—*continued.*

which he has no privity, if it be consistent with all the facts necessary to the demandant's case. *Green v. Watkins*, 7 Wheat. 27.

11. But if such title be inconsistent with any fact necessary to be proved by the demandant to maintain his title as against the tenant, it may be proved. Thus, if the demandant rely for proof of seisin only on a patent, which gives constructive seisin, the tenant may prove an earlier patent to a third person. *Ib.* And see *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99.

12. On trial of a writ of right it is erroneous to exclude competent evidence of title on the ground that if admitted it will not prove that the demandant has more mere right than the tenant; until it is admitted it cannot be compared with the evidence of the tenant, and it cannot be known who has the better right. [BALDWIN, J., dissenting.] *Braistreet v. Thomas*, 12 Pet. 174.

13. The demandant may recover an undivided part of the land under a count for the whole. *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99.

14. If judgment on a writ of right be for the demandant against all the several tenants, it may be joint as to costs as well as to the land, although the tenants had pleaded severally. *Liler v. Green*, 2 Wheat. 306.

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